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UNIVERSITY OF ALBERTA

THE DEBATE OVER LIBERALIZATION OF DIVORCE LAWS IN CANADA, 1950 - 1968

BY

DOUGLAS BAILIE

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A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of Master of Arts.

DEPARTMENT OF HISTORY

Edmonton, Alberta
FALL 1994

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, a thesis entitled THE DEBATE OVER LIBERALIZATION OF DIVORCE LAWS IN CANADA, 1950 - 1968 submitted by DOUGLAS BAILIE in partial fulfillment of the requirements for the degree of Master of Arts.

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ABSTRACT

Throughout the first half of the twentieth century, Canada maintained one of the more restrictive divorce laws in the Western world. This study focuses on the intellectual arguments leading up to the passage the Divorce Act of 1968, which broadened the grounds for divorce and provided Canada with the first uniform divorce law for the entire country. In the eighteen years preceding this event, Canada went through tremendous social changes. The debate over divorce laws reveal much about the changing relationship between the state and the individual, secularism and religion, the institution of marriage and the expansion of the middle class. The changing attitudes toward divorce therefore illustrate the evolution of liberal ideas which marked the era.

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INTRODUCTION

Throughout the first half of the twentieth century, Canada maintained one of the more restrictive divorce laws in the Western world. Other Commonwealth countries such as Australia and New Zealand had already gone further in liberalizing divorce laws than England, which had itself extended the grounds for divorce in 1937.[1] Canadian divorce statutes from the mid nineteenth century remained frozen in time.

Laws governing divorce represent a key aspect of the relationship between the individual and society. They play a role in regulating family relationships. And since many people believe that the family constitutes the basis of society, writing divorce laws has been seen as involving a precarious balance between allowing for the faults of individuals and maintaining the fabric of society. Therefore the arrival of the first federal divorce law can tell us something about the ideological underpinnings of the Canadian state in the post-Second World War era.

This study focuses on the intellectual arguments leading up to the passage of the Divorce Act of 1968. Although there are many social and legal issues, such as alimony and child custody, involved in the question of divorce, the main concern here is with the ideas used in

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[1] For a history of divorce in the West see Roderick Phillips, Putting Asunder: A History of Divorce in Western Society. Cambridge: Cambridge University Press, 1988.

debating for and against liberalized divorce. The sources are almost exclusively from elites such as politicians, lawyers, church leaders and journalists. Although through these, and with the addition of public opinion research, we can make some approximation of the popular mind.

Historical study of the family has emphasized marriage formation over dissolution, largely because legal divorce was relatively uncommon in Western society until the nineteenth century.[2] In Putting Asunder (1988), Roderick Phillips provided a broad study, which analyzed both the differences and commonalities within the West on the issue of divorce throughout its history. James Snell's In the Shadow of the Law (1991) is the only major study of divorce in Canada. Its analysis of the relationship between the law and society's ideal of the family is limited to a time (1900 - 1939) when changes in divorce law were restricted to matters of gender equality and legal process. It therefore provides a point of departure for the present study.

The divorce laws of Canada before 1968 effectively recognized adultery as the only ground for divorce. That statement simplifies the complicated evolution of divorce in Canada. Although the British North America Act explicitly states in section 91 that divorce is a matter of federal jurisdiction, the divorce laws of Canada were a patchwork of varying statutes across the country. Each colony had its own

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[2] Phillips. Putting Asunder. xii, xiii.

divorce law before Confederation, and the BNA Act (in section 129) left these laws in place.[3]

Under British tradition, each colony received the laws of England as of the date the colony was created. England had no divorce law until 1857. Before that time, matrimonial law was under the jurisdiction of ecclesiastical courts which only had power to grant a judicial separation (which ended cohabitation but did not allow the couple to remarry) but not a final divorce. In the late seventeenth century, parliament began granting divorces by private act, based on the idea that the sovereignty of parliament allowed it to recognize exceptions to the indissolubility of marriage in England. Individuals seeking a divorce were able to petition parliament for a bill recognizing their divorce, and that bill was then treated as any other piece of legislation. At the time, such petitions were so rare that it did not create a great burden on parliament.

Thus the British North American colonies had no divorce law at the time of their creation. The Maritime colonies wrote their own divorce laws in the late eighteenth and early nineteenth centuries. Although the evolution of these acts was complicated, the end result was that adultery was the only ground recognized for divorce, except in Nova

---

[3] The following account of the early divorce laws of Canada is drawn heavily from A.W. Roebuck, et al. Report of the Special Joint Committee of the Senate and House of Commons on Divorce. Ottawa: Queen's Printer, 1967, 47-53, 63-5. Hereafter referred to as Report.

Scotia where the ground of cruelty was also recognized. Newfoundland, from the founding of its legislature in 1832, had no divorce law. Its provincial courts were recognized to have the same power as the English ecclesiastical courts to grant only judicial separations.

In Central Canada, the Quebec Act of 1774 reinstituted French civil law, which was adopted in codified form in 1866 by the United Province of Canada. Section 185 of the Civil Code of Quebec stated: "Marriage can only be dissolved by the natural death of one of the parties, while both live it is indissoluble."[4] Ontario, which was created (as Upper Canada) by the Constitutional Act of 1791, had no divorce law until the Parliament of Canada enacted such a law for it in 1930. That act gave Ontario the divorce law adopted by England in 1857, effectively regarding adultery as the only ground for divorce (see Appendix A).

The English law of 1857 was also in force in British Columbia (created in 1858) and in the Northwest Territories (acquired by Canada in 1870).[5] Thus, Manitoba,

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[4] Quoted in Report, 50.

[5] The Hudson's Bay Company had legislative authority in the Territories and Rupert's Land beginning on May 2, 1670. The existing laws of England on that date were in force. Although the Territories were aquired by Canada on July 15, 1870, the laws of England as of this date did not apply to the Territories until Feb. 18, 1887, following the passage of the Northwest Territories Act of 1886. See Catherine Anne Cavanaugh, The Women's Movement in Alberta as Seen Through the Campaign for Dower Rights, 1909 - 1928, unpublished MA thesis, Edmonton: University of Alberta, 1986, 112.

Saskatchewan, Alberta and the Yukon -- all carved out of the Northwest Territories -- inherited the law of 1857.

After Confederation, only the federal parliament had the power to amend these laws. In the first one hundred years after the BNA Act was passed, Ottawa made only a few procedural changes to the divorce laws. For those provinces that had no divorce law (Quebec, Newfoundland and, until 1930, Ontario) parliament passed private bills for divorce. Although under the sovereignty of parliament, these bills could be passed on any grounds or even no grounds at all, the practice of granting divorce only for adultery was maintained. Because divorce was a matter of civil law, administered by provincial courts, even in those provinces that shared the law of 1857 there were differences of application. For example, in Alberta judges did not demand corroborating evidence of adultery, but simply a voluntary admission by the guilty spouse. This partly explains why in the 1960s, the divorce rate in Alberta was twice the national average,[6] and further illustrates how uneven the divorce process was between provinces. The Divorce Act of 1968 was the first time parliament chose to change the substance of these laws by creating new grounds and one uniform law for the entire country.

Beyond the legal evolution of divorce, there were

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[6] Douglas F. Fitch. "As Grounds for Divorce, Let's Abolish Matrimonial Offences," The Canadian Bar Journal. 9. April 1966, 86.

social changes involving the role of the state. James Snell showed how the earlier history of divorce in Canada described aspects of class and the rise of the modern state. During the nineteenth century, the lower orders of society often used informal methods for recognizing a broken marriage or the remarriage of an abandonded spouse. After the turn of the century, people began to look beyond their local community and came to rely on formal state approval.

> Earlier forms of proletarian marital rituals and beliefs were becoming increasingly attenuated within Canadian society as a whole. For many Canadians seeking marital dissolution, the approval of family or community was no longer sufficient; the power and authority of the state occupied a much more prominent place in the culture of early twentieth-century Canada.[7]

But throughout the early part of the century, there was a middle- class perception that much of the working class lived outside of the standard family structure. Divorce law reformers at the time argued that broader grounds would allow these people to legitimize their relationships, and thus be included in the societal definition of the family.[8]

A primary feature of the post-war era is the massive expansion of the middle class. In studying this time period, the question of how attitudes towards marriage and divorce changed should be considered against the backdrop of this

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[7] James G. Snell. In the Shadow of the Law: Divorce in Canada, 1900 - 1939. Toronto: University of Toronto Press, 1991, 256.

[8] Ibid., 72-3.

realignment of social classes.

This study describes the extension of legal grounds as a process of liberalization, a word that not everyone involved in debating the question at the time would have chosen. It is used here because the arrival of the new divorce law marked another step in the development of the liberal state. It recognized the changing relationship between the individual and state, the waxing of the Christian society and the waning of a pluralist, secular one. The debate described here was one that rarely made it to the headlines, and was not a major concern for the majority of Canadians. But for tens of thousands, the resolution of the issue meant the difference between continued hardship and eventual relief. It was a resolution that involved the state's acknowledgment of its own limited power to force people to live up to an ideal standard set by generations gone by.

CHAPTER ONE

PARLIAMENTARY REFORMERS AND AN INDIFFERENT PUBLIC

On April 5 1950, David Croll, a Liberal backbencher from Toronto, managed to put a motion before the House of Commons just before it adjourned for the Easter break. He moved that the House set up a committee to study the possibility of broadening the legal grounds for divorce in Canada. The fiery debate which followed revealed how strong the resistance was to any liberalizing of the divorce statutes which Canadian provinces had adopted from England in the colonial days of the 19th century. As Croll found out that day, the obstacles were insurmountable. The debate nevertheless featured examples of the various types of arguments, sacred and secular, that would continue to be applied to the divorce laws over the next eighteen years.

Croll argued that the law as it stood was ineffectual, outmoded and had become a burden on parliament. One would think the MPs could at least agree on the latter point. The practice of passing private bills of divorce through parliament required a tremendous amount of time and resources. This procedure caused few problems in the nineteenth and early-twentieth century when only a handful of individuals petitioned parliament for a divorce in any given year. But after the First World War as divorce in Canadian society became more common, the system became a distasteful and inconvenient burden on parliamentarians. By

the 1920s bills were passed in batches of fifty, or even a hundred. A committee of the Senate was entrusted with reviewing the evidence in support of each petition. Once it had accepted the evidence, parliament usually gave the bill rubber-stamp approval. The Speaker had dispensed with the basic parliamentary procedure of reading out the title of each bill before voting on it. MPs and Senators had given up even the pretence of knowing something about the bills they were supporting.[1] Croll began his argument by trying to hit a nerve with every MP:

> Like other hon. members I am a little tired of going through this make-believe process, as we did today, of passing, by number and en bloc, divorce bills about which we know nothing and care less. ...why should we in this house be required to accept the role of silent, uninformed accomplices, but decisive ones? I wonder whether that is our conception of the high duties we are sent here to perform.[2]

Croll continued by saying that the excessively restrictive grounds for divorce in Canada (adultery only) were ineffectual in keeping marriages together and simply led people to deceive the authorities for the sake of obtaining a decree. The law was being circumvented on a wide scale. As Croll put it, "In practice, there are two grounds for divorce in this country, adultery and perjury."[3] He

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[1] Snell, In the Shadow of the Law, 67.

[2] Debates of the House of Commons. Ottawa: King's Printer, 1950, 1576. Hereafter referred to as Commons.

[3] Ibid., 1577.

read from a Globe and Mail article[4] describing the practices of what came to be known as professional co-respondents. These were women who helped men fabricate evidence of adultery by allowing themselves to be discovered in a compromising situation in a hotel room. Croll charged that this type of fraudulent activity had become an every-day occurrence in Canada and was undermining the integrity of the law. "There is no field where the law is a greater hypocrite than in the divorce courts."[5]

He stressed that he was calling for only moderate reform, explicitly distancing himself from the lax divorce laws existing in some American states. Also, he argued that divorce is the result of a failed marriage, not the cause of it. Therefore, the state could not protect marriage by making divorces difficult to obtain. "I believe one thing is clear, and that is that we cannot legislate marital happiness."[6] Finally, he asserted that the law "no longer adequately reflects the public need or the public mind" and so must be changed.[7]

The ultimate aim of Croll's motion was to update

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[4] Kenneth Cragg. "Divorce Headache," Globe and Mail. May 6, 1947, 15.

[5] Ibid., 1580.

[6] Ibid., 1577-8.

[7] Ibid., 1581.

Canadian divorce law with Britain's law, as amended in 1937.[8] For this he was practically labelled a communist by one of his own Liberal colleagues. Pierre Gauthier, MP for Portneuf, Que., said divorce was "anti-social and anti-patriotic," and that it is "one of the weak spots of democracies through which communism finds easy admittance into our democratic homes."[9] He went on to give the House a lesson in Marxist and Soviet attitudes toward the family. Gauthier was perhaps an extremist in this matter. It did not become common in the Cold War for Canadian opponents of divorce reform to link divorce to communism. But Gauthier's broad argument was one with which many Canadians at the time could concur, that the family was the basis of society, and that the growing incidence of divorce was a threat to society that should be discouraged.

> Here are the dangers lying ahead when permanence of union is denied. The conjugal union is rendered precarious by the very danger of eventual divorce. There is the seed of suspicion full of anxiety. Benevolence and community of interest are deeply weakened by the possibility of separation. Pernicious incitements are offered to infidelity. The birth of children, conservation and education are exposed to the greatest dangers. Occasions of discord between families and relatives are multiplied. The seeds of discord are more plentifully thrown about. Dignity and the functions of woman are shamefully humiliated. There is the most fatal damage to state prosperity. The authority of either the father or the mother is likely

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[8] Croll's motion suggested the committee study the grounds of desertion, cruelty, incurable mental disease and legal presumption of death. All but the latter were included in the British law of 1937. Ibid., 1576-7.

[9] Ibid., 1581.

> to be destroyed. Destroy authority in the family and you destroy it in the nation.[10]

He concluded by saying that if he were to sponsor a motion on this subject it would be for a committee to consider the dangers facing the country "due to irresponsible frivolity attached to modern marriage..."[11]

Of the six MPs who spoke after Croll, only one supported him. Most but not all of his critics were Catholic. The point of consensus among them was that contemporary society did not take marriage seriously enough as it was. If the state should be doing anything, they argued it should provide more support for families. James Macdonnell, the generally reformist Conservative from Toronto, suggested that it was too easy to get married and that marriage ceremonies should be more formal so as to impress upon the couple the seriousness of the matter. William Carroll (Liberal, Cape Breton) proposed making adultery a criminal offence. There was little sympathy for those whose marriages failed. As Carroll said, "We are not here to help people out of their misfortunes, brought on by their own selfishness and their own greed."[12]

For the opponents of reform, any move that would make divorce easier to obtain was the moral equivalent of a "Reno

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[10] Ibid., 1584.

[11] Ibid.

[12] Ibid., 1593.

divorce." They focussed their contempt on Croll's proposal to add the ground of cruelty to Canada's divorce law. The cruelty ground had a particularly bad reputation, because of occasional news stories which described the trivial reasons for which divorces were granted in other countries (particularly the United States.) As Gauthier said, spouses should be committed to each other for life, not "until one gets tired of the other because of so-called mental cruelty, because one party starts smoking in bed or snores or likes playing poker too much."[13] Browne cited examples of American news stories, collected in a pamphlet called "Divorce, A Picture from the Headlines," which listed such reasons for cruelty as:

> She took an hour and a half to make up her face.
> He was a vegetarian and upset her diet.
> He came to breakfast dressed in long underwear.
> She bought a gentleman friend a set of false teeth.[14]

By citing this, Browne was not only criticizing the ground of cruelty, he was playing to the sense of moral superiority that many Canadians felt towards the United States on the issue of divorce. He went on to say, "Marriage for them (Americans) is a purely materialistic matter, and it seems to me it is very difficult to expect that marriages of that kind are going to be happy."[15] Thus, maintaining

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[13] Ibid., 1583,

[14] Ibid., 1589.

[15] Ibid., 1591.

restrictive divorce laws was a national matter, reflecting Canadians' higher moral values.

The opponents of divorce reform saw these values as rooted in religious tradition. Several of the speakers made biblical references and described the marriage bond in supernatural terms. Daniel McIvor, a 77-year-old United Church minister and a Liberal member for Fort William, Ont., cited "lack of trust in the Supreme Being" as one of the causes of divorce.[16] William Browne (PC, St. John's) said that as a Catholic he believed marriage to be indissoluble, and that no sin committed by one partner could change that. Furthermore, he argued, that no parliament had the power to dissolve a marriage, regardless of what the BNA Act said.[17]

The clash of sacred and secular views played out in this debate was decisive, and it was the sacred views that held sway in the House on this day. The numbers of MPs still in their seats had gradually diminished during the course of the debate, until at the end there were fewer than 50 remaining. With little political advantage to be gained in a debate on divorce, most of the members were already on their way home for Easter. Finally, seeing the writing on the wall, Croll withdrew the motion before a vote could be

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[16] Ibid., 1586.

[17] Ibid., 1590.

taken.[18]

Although the motion came to a dead-end, it provides a good example of the arguments used in the debate over divorce liberalization. For those opposed, restrictive divorce laws protected the institution of marriage because the harder it was to get a divorce, the less divorce there would be. For supporters of reform, the divorce laws were hypocritical, pretending to protect marriages while they encouraged sexual infidelity and perjury as the only way out of impossible situations. Easier access to divorce would ultimately benefit the institution of marriage by allowing broken marriages to be dissolved legally.

It is difficult to say how closely the views on divorce expressed in the House reflected those of the general public. However, there is little doubt that in 1950, marriage and family were celebrated institutions. The concerns of divorcing couples barely rated on the public agenda. The years immediately following the Second World War saw more of a mixture of good and bad news for the Canadian family. While the number of marriages was up as returning soldiers headed for the altar, the end of the war also brought a divorce boom. This trend peaked in 1947 when 8,199 marriages were legally terminated -- more than double the number of divorces of the early 1940s. The years from 1940

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[18] Ibid., 1593; "Less than 50 MP's [sic] in Seats When House Adjourns for Easter," Ottawa Journal. April 6, 1950, 2.

to 1945 saw a divorce rate that averaged 30.3 divorces per one hundred thousand Canadians. From 1946 to 1950, the numbers rose to 53 divorces per one hundred thousand population. This was obviously a cause for concern in a society hoping to return to normalcy after the rupture of war. The United Church of Canada made its position clear by releasing a report in 1946 firmly opposing the trend toward marriage break-ups and taking a hard stance against any liberal reforms.[19] But the divorce rate soon dropped in the 1950s, to just below forty divorces per thousand population.[20] The divorce boom proved to be a short-term factor related to the recent war (see Table 1 and 2).

So by the time Croll introduced his motion, the concern over spiralling divorce rates had subsided. As the divorce rate dived, the number of marriages remained high.[21] This was no longer a matter of returning soldiers starting families that the war had delayed. There was a movement among young adults toward early marriage and family. The baby boom which took place roughly between 1946 and 1962 was

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[19] Records and Proceedings. (Hereafter referred to as RP.) Twelfth General Council of the United Church of Canada, 1946, 142-7. From the Report of the Commission on Christian Marriage and the Christian Home.

[20] Canada Year Book, 1956, hereafter CYB, Ottawa: Queen's Printer, 1956, 230, and 1965, 264.

[21] The rate of marriages per thousand population was the highest in the 1940s, averaging about 9.8. This drops slightly in the first half of the 1950s to 8.7. CYB, 1957-58. 198.

not a result of Canadians having larger families. It was because more Canadians were getting married and having medium-sized families (two to four children).[22]

More of these families were able to attain the middle-class ideal of owning a home in the suburbs. The 1950s marked a great migration from the high-density, mixed-class nature of the cities to the low-density suburbs where the middle class dominated. From 1941 to 1961, the population of the city of Toronto remained virtually static, while the surrounding areas which eventually became part of Metropolitan Toronto grew from about 243,000 to 946,000.[23] The significance of this to marriage and divorce is that the suburbs can be seen as a manifestation of middle-class attitudes toward the family. The suburbs are a protective environment: the home is a detached unit surrounded by a relaxed park-like atmosphere; domestic life is physically separate from work; class and ethnic division within the community are minimal. Thus, suburban life allowed the middle class to focus their attention on the family.[24] In the same way that the 1950s were an era of unmatched

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[22] Jacques Henripin. Trends and Factors of Fertility in Canada. Ottawa: Statistics Canada, 1972, 337.

[23] S.D. Clark. The Suburban Society. Toronto: University of Toronto Press, 1966, 8-9.

[24] See Robert Fishman, Bourgeois Utopias: The Rise and Fall of Suburbia, New York: Basic Books, 1987, 8-10 and passim; also Elaine Tyler May, Homeward Bound: American Families in the Cold War Era, New York: Basic Books, 1988.

suburban expansion, so were they an era of the family.

This was also an era of affluence and consumerism -- forces which shaped family relationships. It is incorrect to view the 1950s as a time when people returned to an earlier generation's ideal of the family. The family had been a diverse and changing institution with little stable tradition to which to return. Some sociologists argue that the family has been transformed from an economically productive unit in the pre-industrial economy (where every member contributed to the family's material situation) to a consuming unit in the industrial society (where the male's role is to be productive and provide for the family's material needs).[25] And the 1950s witnessed a great leap forward in consumption. The decade saw a number of household items become commonplace, from electric or gas ranges, refrigerators and vacuums to cars and television sets.[26] The new ideal of the family was bound up in the rising consumer-oriented society.

While materialism represented the modern practices of middle class married life, its traditions were rooted in religion. The traditional Christian view of marriage and

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[25] Chad Gaffield. "Wage Labour, Industrialization, and the Origins of the Modern Family," The Family: Changing Trends in Canada. Maureen Baker, ed. Toronto: McGraw-Hill Ryerson, 1984, 21-6.

[26] CYB, 1957-58. 1958, 144-5; O.J. Firestone, Broadcast Advertising in Canada: Past and Future Growth. Ottawa: University of Ottawa Press, 1966, 245.

divorce was based on New Testament passages where Jesus spoke directly to the subject: "Whosoever shall put away his wife, and marry another, committeth adultery against her. And if a woman shall put away her husband, and be married to another, she committeth adultery."[27] This provided the basis for the absolute view of the indissolubility of marriage shared by Catholics and some protestants. St. Matthew put a wrinkle in the issue by using an almost identical quotation of Jesus, but adding "fornication" as an exceptional reason for divorce.[28] In this passage can be seen the biblical basis for the divorce law in Canada.

The sacred nature of marriage in Catholic tradition is expressed by the church's practice of regarding the marriage ceremony as a sacrament. As with other sacraments, such as the Eucharist, the church believes that God's grace is conferred upon the participants. The leaders of the Reformation in the sixteenth century rejected this doctrine, but as former monks who had abandoned their vows of celibacy, they had nothing but praise for the institution of marriage. Both Catholics and protestants agreed, however, on the primary purposes of marriage. It compelled men and women to procreate, and it provided a moral context for sexual

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[27] Gospel According to St. Mark, 10:11,12. King James Version.

[28] Gospel According to St. Matthew, 19:9. King James Version.

relations.[29] (It follows logically from this that if divorce is to be allowed at all, then adultery is going to be the only ground accepted.) These views are reflected in a resolution adopted by the United Church of Canada in 1946, which said in part, "...marriage, parenthood and family association have God-given significance, and the birth of children has a Divine end and blessing."[30]

As long as Canada remained a Christian country, at least in the eyes of some elite groups, there would be strong resistance to broadening the grounds for divorce. But it was precisely that view of the country that was breaking down.

Secularization of society had been a concern among Canadian clergymen for at least a century. D.B. Marshall's recent work on this subject showed that by the 1930s the triumph of secular values among protestants was undeniable: "It was clear that Christianity either strongly believed or practised or experienced was rare."[31] Consumer culture undermined sacred belief by distracting people from concern for their soul in the next world in favour of material satisfaction in this one.[32]

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[29] Phillips, Putting Asunder, 27,41,66.

[30] RP, 142.

[31] Secularizing the Faith: Canadian Protestant Clergy and the Crisis of Belief, 1850-1940. Toronto: University of Toronto Press, 1992, 255.

[32] Ibid., 254.

Church attendance was dropping in the 1940s and 1950s, mainly among protestant groups. According to Gallup polls, Catholic church attendance remained in the eighty-per cent range during this period, while attendance among protestants dropped from 60 per cent in 1946 to 43 per cent in 1957.[33] But because of the growing population, the real numbers of church attendance were rising even as the proportion of Canadians attending church was dropping.[34] The period from the end of the war until the early 1960s is sometimes described as a religious boom. Many denominations supported the erection of new churches in the suburbs and office buildings for growing staffs. Expansion became one of the main themes of church life.[35] But this only served to disguise the growing disinterest among Canadians in organized religion.

Secularization was undermining supernatural explanations of the world by forcing those explanations to compete with empirical science.[36] For those adhering to the traditional Christian view, marriage described a mystical

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[33] Canadian Institute of Public Opinion. Aug. 18, 1965 and June 12, 1986.

[34] Reginald W. Bibby. Fragmented Gods: The Poverty and Potential of Religion in Canada. Toronto: Irwin, 1987, 12-4..

[35] John Webster Grant. The Church in the Canadian Era: The First Century of Confederation. Toronto: McGraw-Hill Ryerson, 1972, 160-3.

[36] Marshall, Secularizing the Faith, 7.

bond. Breaking it meant putting one's eternal soul at risk.

> For this cause shall a man leave father and mother, and shall cleave to his wife: and they twain shall be one flesh. Wherefore they are no more twain, but one flesh. What therefore God hath joined together, let no man put asunder.[37]

Where marriages were in crisis, the churches offered traditional theological solutions. The United Church, for example, alarmed by the increasing incidence of divorce after the Second World War, resolved in 1946

> to proclaim to all threatened but not necessarily doomed homes, the gospel of reconciliation by the Cross and the power of the Resurrection, for God's grace can save to the uttermost; it can cleanse the lustful mind; it offers redemption to the adulterer; and by its saving truth families in jeopardy may be rescued.[38]

The mystical bond of marriage was thus sustained by a mystical authority -- one that superseded any worldly authority. Catholic MPs such as William Browne (mentioned above) questioned the power of parliament to grant divorces:

> Neither the British parliament nor this parliament can make a wrong right. They cannot do that. If it is morally wrong and spiritually wrong, we cannot do it, and they cannot do it over there.[39]

And since it was, in this view, people's eternal souls that were at risk, it was pointless to discuss the right of individuals to make such decisions according to their own moral conscience. In 1950 the Catholic journal Relations scoffed at the notion of public opinion polls on the

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[37] Ibid., 19:5,6.

[38] RP, 1946, 142.

[39] Commons., 1590.

remarriage of divorcees:

> A l'origine, Dieu a fait indissoluble l'union de l'homme et de la femme. Notre-Seigneur a rétabli dans son intégrité le mariage, déchu au cours des siècles. Ce n'est pas aux hommes mais à Dieu qu'il faut demander si le divorce est permis.[40]

Furthermore, the journal argued, despite the confusion among some members of the faith, any Catholic theologian would tell you that "le mariage des non-baptisés, même s'il n'est pas sacrement, est une union légitime et indissoluble...."[41] As the mystical underpinning of this view grew weaker, as fewer people among the elites held this view, and the acceptance of people's right to follow their own conscience grew then the intellectual basis of the divorce laws would dissolve.

Secularization also involves the replacement of religious with civic values.[42] Hence, many opponents of divorce law reform, rather than put their arguments in theological terms, emphasized their concern for the family as the basic unit of society. A good example was Pierre Gauthier who, in his lengthy response to Croll, focused on the importance of the family in a democratic society. While his commitment to Catholic doctrine came through, his argument was mainly a lesson in civics, not theology. His

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[40] "Remariage des divorcés," Relations. janvier 1950, 16.

[41] Ibid.

[42] Marshall, Secularizing the Faith, 7.

account of the history of divorce law in the Soviet Union -- its original laxity, its attempt to take away the individual's commitment to family and replace it with a commitment to the state -- claimed that the social disorder this policy created caused even the Soviets to back away and make divorce difficult to obtain. If communists can be forced to realize the importance of family to society, Gauthier asked, then how could we talk of easy divorce? The family, he said, is key to maintaining respect for the worth of human life.

> The family is the training school, the novitiate of democracy. Destroy it by any means and you threaten the very life of democracy. When a nation ceases to put the highest value on the home it will not be long before it ceases to put value on a person; then both Marxism and rotten capitalism meet, because both have valued man as a mere economic animal.[43]

Of course, many supporters of divorce reform agreed that the institution of the family was vital to society, and so made the argument that allowing greater access to divorce would in fact benefit the family. As Croll said:

> The basis of our society is the family; but shall we endanger its very structure by exposing people who cannot possibly live together to circumstances where relief is available only if they commit adultery or perpetrate a fraud? I think too highly of the moral values of our society to believe that we can permit such a situation to continue.[44]

Perhaps the most significant aspect of the secularizing trend in Canada at this time was its uneven advance among

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[43] Commons, 1950, 1584.

[44] Ibid., 1580.

Catholics and protestants. We have seen how church attendance remained high among Catholics in this period while it dropped significantly among protestants. Furthermore on the question of divorce, polls showed that protestants were more likely than Catholics to say that it was "too difficult" to get a divorce in Canada.[45] But this was not the position of the majority of Canadians until the mid 1960s, and it is likely that opinion at this time was split between those who felt there should be some small allowance for divorce and those who felt it was immoral and should be banned.

The most important reason why Canada maintained such highly restrictive divorce laws must be the place of Quebec in the Canadian federation. From the country's beginnings, the federal government stayed away from any substantive amendments to the divorce laws. Croll's idea of divorce reform was blocked primarily by its close relationship to the national unity issue.

This fact was openly acknowledged by no less than the prime minister two months after the Croll's motion. The occasion was the debate over a private-member bill by Stanley Knowles (Co-operative Commonwealth Federation, Winnipeg North Centre) -- a bill he repeatedly submitted to

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[45] The only poll available that broke-down its results by denomination is from 1963, where 59 per cent of protestants and 35 per cent of Catholics said it was "not easy enough" to get a divorce. Canadian Institute of Public Opinion. Oct. 9, 1963.

the House most every session from 1944 until the late 1950s. Its goal was much more modest than Croll's motion. Rather than attempt to make substantive changes to the divorce laws, its aim was only a procedural change in the granting of parliamentary divorce bills. The bill would have given the Exchequer Court (the predecessor of the Federal Court of Canada which judged claims against the Crown in such areas as patent and tax laws) jurisdiction over divorce cases in Quebec and Newfoundland. Knowles argued that in this way the cumbersome and imperfect process of turning parliamentarians into judges could be replaced by an actual court, without creating divorce courts in provinces that did not want them. When this bill finally received second reading,[46] Knowles stressed that the bill did not widen the grounds for divorce in Canada, but only changed jurisdiction for dealing with some divorce cases from one institution of the federal parliament to another. "In other words, it only transfers it from one building to another, from the centre block to the building to the west where the exchequer court meets."[47]

Voices of conservatism in the House were unmoved. A Newfoundland MP said the bill would amount to a violation of the terms of union under which his province joined Canada the previous year. Pierre Gauthier and William Browne

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[46] The debate on the second reading of this bill can be found in Commons May 26, 1950, 2907-13; June 13, 3574-80; and June 20, 3890-5.

[47] Commons., May 26, 1950, 2908.

trotted out much the same arguments they had used the month before concerning the evils of divorce. Two MPs, one Catholic and one member of the United Church, suggested the solution was simply to stop passing divorce bills. Only two of the nine speakers who followed Knowles declared support for the bill. The most notable contribution to the debate came from Prime Minister Louis St. Laurent who argued that the bill amounted to overriding section 185 of the Quebec civil code (the section that states a marriage in Quebec cannot be dissolved). This point became more forceful by describing the divorce issue as a matter of French-English relations. Among MPs who could easily recall the dark days of the conscription crisis in the Second World War, his statement must have carried a great deal of weight:

> We have made considerable progress in recent years toward national unity, and the matter now being debated is something which would be felt by a large number as being an imposition by a majority of a law that the people of the province of Quebec do not want. Why do it? Simply because it would relieve us here of the painful duty of having to consider these individual divorce bills, why create that controversy and disturb a situation with which I think most Canadians are satisfied, why disturb the good relations and tolerant attitude of each sector of the population toward the other sectors of the population?[48]

Knowles made the counter-argument that parliament was overriding the Quebec civil code almost every time it passed another divorce bill -- and that amounted to some 300 times per year. But the PM had spoken and the bill was defeated,

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[48] Ibid., June 20, 1950, 3892.

with the Liberals voting as a block on a motion that was not a matter of confidence. Political scientist J. Murray Beck observed that this was a testament to St. Laurent's influence among his backbenchers,[49] but it also indicated the lack of popular support for divorce reform.

The politicians pushing for divorce reform had to deal with the reality that their endeavours lacked support among the population. Rather than give up, in 1951 Stanley Knowles turned to an old method used in a similar situation to put pressure on parliament and perhaps generate some public debate. He decided to bring the passage of parliamentary divorce bills to a virtual halt by filibustering each bill. The same tactic was successfully used by former CCF leader J.S. Woodsworth in 1929 and 1930 to pressure the government into giving courts in Ontario jurisdiction over divorce.

The 1951 session of parliament witnessed a great deal of reluctance by MPs, both for and against reform, to continue to tolerate the current process for divorce bills. George Murray (Cariboo, Liberal) was concerned that the sanctity of marriage was being pushed aside by the habit of passing these bills en bloc. He felt that one particular bill on the order paper that day (March 2) described a tragedy of Biblical proportions (likening it to the story of Samson and Delilah), involving a wife who abandoned her

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[49] "The Canadian Parliament and Divorce," The Canadian Journal of Economics and Political Science. 23. August 1957, 305.

husband for an American who was reported to be a communist leader. He called for the bill's passage, but also argued that it was important that the MPs give a detailed consideration to the facts of the case so that justice would be done and the sanctity of marriage be preserved. He offered the following socio-political analysis to justify a close look at the case.

> If there is no sanctity of marriage we might as well close up parliament because parliament is based upon the proposition that we have established homes in the country. You cannot have a parliament when people are nomads travelling about on horses gathering up women in one town and carrying them on to the next. Parliament is based on the idea of the sanctity of the home and upon the fact of course that Canada is a Christian country. Marriage vows must be taken seriously if marriages are to endure.[50]

Other MPs took the opportunity to discuss the faults of the process of parliamentary divorce. Those who supported the granting of divorces for broken marriages wanted to end the process of private divorce bills. And so did those who opposed all divorce on religious grounds.[51] Added to this was the Quebec nationalist perspective, represented by Alphonse Fournier, minister of public works: "It all comes back to the fact that members who are not living in the province of Quebec want to tell us the way in which we should proceed with divorce."[52] He went on to admit that

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[50] Commons., 857-8.

[51] Ibid., 857-859. See particularly Wylie, Richard and LaCroix.

[52] Ibid., 859.

there must be a way of allowing the protestant minority in the province access to divorce, but had no suggestions as to how the process should be reformed.[53]

On April 20, with another batch of bills before the House, George Cruickshank (Fraser Valley, Liberal) asked that the bills be dealt with separately. After more debate on the process and the morality of divorce bills, the Speaker made the ruling that unanimous consent was needed to pass the bills en bloc. Without it they would be dealt with individually. He also stated that members would have to restrict their comments in the future to the facts of individual bills and could no longer use up the House's time discussing the principle of divorce in general.[54]

It was in this atmosphere of procedural squabbling by several MPs that Knowles began his blockade on May 8. Knowles asked that the divorce bills be considered one at a time. The chairman (the House was sitting as a committee of the whole) suggested that Knowles simply name which bills he wanted to discuss, and allow the rest to be dealt with en bloc. He made it clear that he wanted to discuss all of them (there were 70 on the order paper that day), and began asking the mover, H. Winkler (Lisgar, Liberal), about

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[53] At this point Fournier mentioned a cabinet committee that met after Knowles's Exchequer Court bill failed in 1950 to discuss alternatives to parliamentary divorce. No solutions were reached, and no public report was made. Ibid., 859-60.

[54] Ibid., 2244-6.

particular facts of the bills. What followed was a kind of political house of mirrors. The mover of the bills had to admit he knew nothing about them, not even their titles. Alphonse Fournier, who opposed all the bills, wanted the vote to go ahead, presumably to get on with more important matters. Knowles was asking for information on bills which he intended to support, regardless of whether or not the information was provided. He and CCF leader M.J. Coldwell asked questions regarding such matters as whether or not there were children involved, and from what province the petition originated. Winkler was unable to provide any answers. At the end of the hour set aside for dealing with private bills, only eight had been passed.[55]

The blockade continued on May 11 with Knowles and Coldwell reading evidence from the Senate committee meetings, suggesting that some of the bills do not deserve to be passed and that the Senate is not capable of dealing with them in sufficient detail. They made it clear that their criticism was not simply that the process was too cumbersome, but that its credibility was weak. Furthermore, other MPs, including Progressive Conservative and Social Credit members, came forward to support the blockade. Robert Knight (Saskatoon, CCF), who complained in 1949 of the cost of printing the evidence of the divorce cases when MPs such as himself never read it, said he supported Knowles push to

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[55] Ibid., 2817-24.

change the procedure and that he would vote for or against the bills according to the evidence made available.[56]

The event did create some headlines[57] and some editorial reaction. The Vancouver Sun was generally supportive of the blockade, calling it a waste of parliament's time, but not as big a waste of time as the divorce bills themselves. But while it pushed for a change in the process, it showed little concern for the couples in broken marriages whose futures were on the line:

> If the people of Quebec and Newfoundland want divorces, they should instruct their legislatures to give them divorce laws. If they do not want divorces, a minority of them should not go running to the Canadian parliament for a special privilege granted in disgraceful haste.[58]

Knowles ended the blockade on June 22, thus allowing all 124 bills on the order paper to pass before the closing of the session. It is doubtful that six weeks was enough to put much pressure on the government, and the story never rated very high on the news agenda. The episode mainly demonstrated the impotence of any attempt to make even small procedural changes in Canada's divorce regime.

Knowles, Coldwell and others continued through the mid

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[56] Ibid., 2948-52. For Knight's comments see Commons 1949, Second Session, 2274.

[57] See "Filibuster Slows Divorce Measures," Montreal Gazette, May 16, 1951, 12; "Seeks to Take Divorces From Parliament," Ottawa Citizen, May 9, 1951, 4.

[58] "Parliament's Divorce Mill," Vancouver Sun. May 10, 1951, 4.

1950s to attack the credibility of the system by singling out certain bills which they claimed contained contradictory evidence, despite their passage by the Senate. Knowles continued to submit his Exchequer Court bill for debate, despite the fact that it had already been categorically ruled out as an alternative.

As if to underline the lack of progress on the issue, in 1955 Senator Walter Aseltine (Saskatchewan), a man who sat on the Senate divorce committee for decades, introduced a bill that was essentially the same as one he worked on in 1938. The original bill, itself based on Britain's divorce reform of 1937, was passed by the Senate but died on the order paper in the Commons. The bill would have expanded the grounds for divorce, but would not have applied to Quebec or Newfoundland. The points raised in the debates were similar to those heard following Croll's motion in 1950, and of course in the end the bill was defeated.[59]

While such debates caused a brief flurry of interest on Parliament Hill, they were rarely published as news items or received a mention on editorial pages. Saturday Night provided a few exceptions to this rule. Shortly after the Croll debate it published an article by Wilfrid Eggleston in which he denounced the enormous resources being used in the Senate (where the committee on divorce took up so much of

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[59] Debates of the Senate. 1955. The debate on second reading begins on 210 and continues intermittently until 352.

its members' time that a rule was recently made stating that it would be the only committee to sit in the morning, thus allowing its members to commit themselves to other committees as well) and supported Knowles's proposal concerning the Exchequer Court.[60]

On those occasions when the press mentioned these parliamentary wranglings, editorialists were largely sympathetic to those pushing for reform. Aseltine was able to list seven newspapers which supported broadening the grounds for divorce.[61] They also gave occasional support to Knowles, Coldwell and other MPs who challenged the credibility of the process. The Ottawa Citizen described the procedure as "a legislative farce,"[62] and Saturday Night said "Canada's divorce regulations are so bad that they do not merit being called laws."[63] Blair Fraser, Maclean's Ottawa editor, wrote two articles which painted the Senate committee in a bad light. The first recounted some of the faulty evidence questioned by CCF members in the House. In one particular case it was eventually discovered that the husband tried to frame his wife for adultery so he could

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[60] "Divorce Reform Sought," April 25, 1950, 3.

[61] Senate. 1955, 346.

[62] "The Senate and Divorce Cases," June 27, 1952, 34.

[63] "The Divorce Muddle," May 23, 1953, 3,4. See also "Quebec's 310 Divorces," Ottawa Journal, June 27, 1952, 6.

stop paying alimony.[64] The second article raised questions about the ability of parliament to act as a quasi-judicial forum. He called parliamentary divorce "a political fossil, a relic of the Middle Ages" which Britain abandoned in 1857 and which Canada maintained only to appease Quebec and Newfoundland.[65] It will be argued below that this depiction of the law as farcical and illegitimate made the greatest impression on the public mind over time and eventually played an important role in spurring the elites into action.

The French press naturally had a different point of view. Relations made fairly regular comment on the issue, responding to the events in parliament.[66] But among major French dailies, as with the English press, coverage and editorial comment on divorce legislation was scattered. In 1956, Le Devoir promoted the idea, agreeable to its nationalist disposition, of making divorce law a strict matter of provincial jurisdiction. It said that Premier Maurice Duplessis had made this suggestion at the federal-

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[64] "The Divorce Committee at Bay," Maclean's. July 15, 1954, 5,61.

[65] "Ottawa's creaky divorce machine," Maclean's. Oct. 29, 1955, 9-11,61-2,64-5. Note: Fraser was criticized in the Senate on June 21, 1955 by Arthur Roebuck, chairman of the divorce committee, for his questioning of the committee's competence on a CBC radio program.

[66] See "Tribunaux de divorce," août 1951, 198-9, for comment on the Exchequer Court Jurisdiction bill; also "'Moderniser' les lois du divorce," janvier 1952, 2; "Le Congrès des Métiers et du Travail et le divorce," janvier 1955, 1,2.

provincial conference of 1950, but was criticized by several other premiers. The newspaper argued the idea deserved reconsideration. "C'est dans cette voie qu'il faut chercher la solution, et non dans les bills de MM. Aseltine et Knowles."[67]

There were people on both sides of the issue who suggested transferring divorce law to the provinces as a way of breaking the deadlock on the issue. But this was never more than a partial solution. The scenario put forward by Le Devoir would likely have left people in Quebec and Newfoundland with no access to divorce. On the other hand, Aseltine's bill would have broadened the grounds for divorce in most provinces while leaving the system of parliamentary divorces unchanged. Nevertheless, the idea was supported by such prominent bodies as the British Columbia section of the Canadian Bar Association in the early 1950s, which promoted a bill similar to Aseltine's (where the federal government would have offered a liberalized divorce law for any province which wanted it).[68]

The press and parliamentarians apparently agreed that the practice of passing private bills of divorce was inappropriate, but there was no agreement on how to replace it. And there was even less agreement the moral and social

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[67] "L'indissolubilité du mariage," 17 fevrier, 1956, 4.

[68] Gilbert D. Kennedy. "Canadian Divorce Laws: Changing Views," Saturday Night. Dec. 20, 1952, 11,22.

implications of making divorce easier to obtain.

Given the overall lack of recognition by the press, it is doubtful that Canadians in general had given much thought to the issue. Opinion polls showed only a slight change in attitudes was taking place. In 1953 a Gallup poll found 35 per cent of respondents thought it was "not easy enough" to get a divorce in Canada, up from 24 per cent in 1943. Apparently, most Canadians felt the process was "too easy" or "about right".[69]

One of the most important supporters of divorce reform was W. Kent Power, the jurist who wrote the standard reference work Power on Divorce[70] in 1948 in addition to lecturing on the subject for over 40 years. In a 1956 article for Maclean's he attacked the current law as being hopelessly unprincipled. The law, he wrote, should not force the particular view of a few denominations on everyone. In addition, a liberalized law would not interfere with the beliefs of those whose religion rejects all divorce. He argued that the law was out-dated because in the century since it was adopted cultural attitudes towards marriage have changed.

Wives and husbands today will not put up with the

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[69] The Canadian Institute of Public Opinion. Oct. 9, 1963.

[70] This is the title by which it is usually referred. Its proper title is The Law and Practice of Divorce and Other Matrimonial Causes in Canada. Calgary: Burroughs, 1948.

> indignities, cruelties and hardships under which, in many cases, their grandparents suffered for years and sometimes for life. Marital slavery and torture are just as much out of tune with the spirit of our age as any other form of slavery is.

Furthermore, several aspects of marriage law, such as property rights and child custody, had changed to recognize the equality of men and women.[71]

People who separated from their spouses did manage to organize on a few occasions. In 1952, the Marriage and Divorce Reform Association was formed in the Toronto area, and in 1949 the Divorce Reform League of British Columbia was founded in Vancouver. The latter managed to publish a book in 1953 titled Canada's Need for Divorce Reform by Rev. Bernard Reynolds, a lecturer at the Anglican Theological College of B.C. While the purpose of the league was to gain public support for divorce reform, fewer than one hundred pages of the book focus on the law in Canada and the need for change. The remaining 275 pages present detailed theological and historical arguments focusing on an Anglican point of view. It is noteworthy that this organization in 1953 chose to spend its resources in this way. It suggests that it was still seen as somewhat important to establish the idea of divorce as legitimate within Christian

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[71] "Throw out our cruel divorce law!," Aug. 4, 1956, 4,45,46. See also Wilfrid Eggleston, "Still Awaits Divorce Remedy," Saturday Night, July 25, 1950, 3, for an account of Power's lecture to a Calgary audience.

tradition.[72]

Thus in the early 1950s a lack of consensus on the country's divorce law precluded any kind of reform. Little had changed over the past few decades in terms of the arguments expressed in parliament or in the press. The large percentage of Catholics in the population and their concentration in Quebec presented the same challenge it always had. One of the few differences between this period and the first half of the decade is that the divorce rate was actually decreasing. This simply gave the government one more reason not to touch the issue. However, signs that the deadlock was loosening began to show in the late 1950s and early 1960s as persistent questioning of the efficacy of the law presented new challenges to Canada's political and social traditions.

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[72] Canada's Need for Divorce Reform. Vancouver: Divorce Reform League of B.C., 1953.

CHAPTER TWO

BROKEN MARRIAGES AND BROKEN LAWS: QUESTIONING THE EFFICACY OF THE DIVORCE REGIME

The growing number of separated and divorced persons in Canada could not continue to be ignored indefinitely. Those who were unable to obtain a legal divorce were at a particular disadvantage. While state and church institutions attempted to sweep the problem under the rug, wives and children were often left with no legal claim for financial support and common-law marriages were increasing. But at the pastoral level, clergymen had to deal with the problems created by broken families. Offering these people the redemptive power of a supernatural being was no longer in itself a sufficient solution for some clergymen.

United Church ministers were bearing more than their share of the burdens created by Canada's dated laws of marriage and divorce, mainly in the performance of remarriage of divorced persons. There were two reasons for this. First, provincial laws were such that as late as the mid 1950s no-one other than a clergyman could officiate at a marriage ceremony east of the Quebec-Ontario border, and Ontario only passed legislation allowing civil marriages in 1950. Second, the other two major denominations, the Catholics and Anglicans, refused to marry divorced persons while their first spouse was still living. Therefore, many people who wished to remarry turned to the United Church when the state or their own church would not help them.

Given this task, many United Church ministers wanted the church to develop a clear policy on remarriage. As dissatisfaction among the clergy continued, attempts to rectify the situation expanded into broader questions about the church's view of marriage and divorce. One of the earliest United Church reports on the subject was produced by the Commission on Christian Marriage and the Christian Home in 1946 (mentioned in the previous chapter). This report presented a conservative theological view of the problem of divorce and recommended the church resist any attempts by the government to broaden the legal grounds for divorce. On the question of remarriage, it made only tentative proposals and advised further study before any final decisions were made. Its recommendations were that the church regard divorce like any other sin for which repentance can lead to forgiveness. In this spirit, those ministers who were willing to conduct remarriages would be allowed to do so, but only after notifying a committee of the presbytery which must then approve or disapprove the marriage.[1] Subsequent general councils in 1948 and 1950 approved a similar policy, but few were satisfied with the results.

A further attempt to deal with the issue came in 1956 when the General Council called for yet another commission on marriage and divorce. The preamble to this motion pointed

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[1] RP, 1946, 147.

to the burden created by the refusal of the Catholic and Anglican churches to remarry divorced persons; the continued "lack of any uniform policy on the part of [the] Church to guide [ministers] in such remarriage"; and the current unsatisfactory policy, requiring notice be given before any remarriage is performed, "because it did not meet, but merely postponed the problem."[2] One of the first steps the new Commission on Christian Marriage and Divorce took was to ask United Church ministers what concerns they wanted the commission to consider. At the top of the list was the issue of divorce and remarriage, followed by such things as the provision of literature on sex and marriage for young couples, and concerns over mixed marriages (mainly between protestants and Catholics).[3] Thus, in the United Church's search through the 1950s for a satisfying position on marriage and divorce, we can see pressure for change coming from ministers who had to deal with rising numbers of divorced persons in Canada.

The reports presented to the General Council in 1960 and 1962 by the commission covered a wide range of issues such as premarital counselling, planned parenthood, and artificial insemination as well as remarriage and grounds for divorce. The basic theological view of divorce did not

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[2] RP. 1956, 90.

[3] RP. 1958, 183-4. The commission sent out about 2,600 surveys, and received almost 1,000 replies within six weeks.

change markedly from 1946. Marriage was intended to be a life-long institution, but occasionally individuals fail to meet this ideal. Such a failure, like any sin, may be overcome through prayers of contrition "for the forgiving and redeeming grace of God...." Before a divorced person can be remarried, they must be "duly repentant of the past failure in marriage...." [4] There were, however, significant differences between the 1946 and 1962 reports. One was the latter's recommendation that the grounds for divorce be extended. The report suggested the federal government appoint a royal commission to consider such additional grounds as desertion for three years, cruelty, and insanity, as well as to find methods for granting divorces other than private acts of parliament.

Another difference was the report's willingness to look to the social sciences to find solutions to problems which had previously been dealt with in almost wholly spiritual terms. The 1946 report did make a few brief references to such things as the importance of providing psychological counselling for troubled marriages, and of government agencies acting in the best interests of the children. But the thrust of the report was that the position of the United Church should be studied "[i]n light of the Church's historic positions, and of man's need and God's saving

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[4] RP. 1962, 250. The decision on whether or not a remarriage should be solemnized by the church was left solely to the minister.

grace...."[5] Sixteen years later, there is evidence that supernatural solutions were being eclipsed by modern academic research. The preamble to the motion calling for a royal commission acknowledges that "social sciences have thrown new light on the causes of marriage failure, and the effects on children of serious friction between parents...."[6] Throughout the report the commission expresses faith in the ability of secular agencies to prepare couples for marriage, support families, sustain marriages and deal with the problems of divorce. Specific mention is made of the national Marriage Guidance Council of Great Britain, the Family Court of Lucas County, Ohio and the Los Angeles Domestic Relations Court. On this basis, the report recommended the federal government create a Division of Marriage and Family Welfare (within the Department of National Health and Welfare)

> to encourage and undertake research into the causes of marital break-down, and the effects of modern life on the family ...to study and extend both pre- and post-marital counselling [and]...to strengthen the family by helping to improve methods of work, especially with families in trouble.[7]

A further recommendation sought the establishment of special marital court procedures where couples seeking a divorce would be required to attempt a reconciliation. In this

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[5] RP. 1946, 147.

[6] RP. 1962, 247.

[7] Ibid., 249.

matter, the courts would

> draw upon the skills of ministers, social workers, marriage counsellors, medical doctors, and others trained in the social sciences in addition to lawyers and other court officials currently employed in attempting to effect conciliation.[8]

This tendency to look beyond the church to find solutions to family problems had been growing over the past decade. In 1948, as the post-war divorce boom was ending, the church founded the Marriage Guidance Council as an exploratory group to develop the church's ability to deal with and try to prevent marriage breakdown. By the 1960s the church's use of social scientific analysis was extensive and, as will be seen in the next chapter, continued to push the church's position on divorce in more radical directions.

Other major denominations did not develop new official policies on divorce before the mid 1960s. But in the meantime the issue was discussed by certain members of the clergy. The arguments put forward by Dr. J.V. Langmead Casserley, an Anglican priest and sociologist, provides an example of how the social sciences could be used to support conservative positions. In a 1957 article for Maclean's,[9] Casserley argued for the abolition of divorce laws in Canada. His argument was based on the questionable assertion that there was no legal recognition of divorce in Western

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[8] Ibid., 248-9.

[9] Casserley, "Divorce does more harm than good," Maclean's. Oct.26, 1957, 10,79-81.

civilization until the nineteenth century. Divorce laws, in his view, developed out of the breakdown of the sacred consensus that had ruled Western society. He wrote, "...with the growth of secularism and religious scepticism people grew doubtful about the sacred character of the marriage tie -- really, of course, because they had become doubtful about the sacred character of anything at all..." Furthermore, individualism had, in Casserley's opinion, undermined the idea that the family is the basis of social order. "The individual became ... a kind of social atom of which society is composed, and social life seemed to be a series of contractual relationships of which marriage is only one."[10]

Casserley asserted that the breakdown of the old order did not advance the happiness of human beings. He referred to the French sociologist Le Play to argue that divorce laws, simply by presenting the possibility of terminating some marriages, challenged the permanence and therefore the security of all marriages. In this way, divorce laws created a new social institution, "unstable marriage", "...in which all marriages tend to be relatively insecure."[11] If we abolished the laws, we would abolish the unstable marriage as an institution. Casserley recognized that couples would continue to separate and much human misery would ensue, but society as a whole would be better off.

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[10] Ibid., 10.

[11] Ibid., 80.

Thus, he presented a sociological argument favouring the reconstruction of a sacred order. He believed that people were beginning to see the flaws in the irreligious and individualistic tendencies of modern society.

> We are now more willing to recognize that our secular life contains a great many sacred elements, and that it cannot be properly organized unless we recognize the degree to which our social life must be shaped by a sense of binding moral obligation from which, under God, we are allowed no way of escape.[12]

By advocating the abolition of all divorce, Casserley had to justify forcing spouses to remain married to an adulterous partner. He argued that adultery as grounds for divorce was one result of the growth of puritanism in the last century. Adultery became an almost unforgivable sin, and divorce laws were developed to accommodate the wronged partner. Casserley claimed that previously, adultery was condemned but often tolerated by society for the sake of maintaining the indissolubility of marriage. A return to such an attitude would meet the general interest of society, he argued.

> Is it better to have more adultery and sexual delinquency combined with a strong and stable matrimonial system, or rather less adultery and sexual delinquency and a weak, unstable matrimonial system which constantly increases the proportion of tragically unsuccessful to successful marriages.[13]

Aside from Casserley's arguments themselves, his article was significant for the minor exchange between

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[12] Ibid., 79-80.

[13] Ibid., 81.

conservative and reform voices which it began. Several months after it was published another article on divorce appeared in the same guest- column space of Maclean's titled "For the Sake of Argument." This time, H.L. Cartwright, a Kingston lawyer, argued that the system of divorce law based on marital offences, such as adultery, should be abandoned in favour of no-fault divorce granted after separation of two years.[14]

The article was clearly, in part, a direct response to Casserley, although it never specifically referred to him. Where Casserley began by stating that divorce was a new thing, Cartwright began by arguing that it was at least as old as the Roman empire and had always been available in some form throughout Western history. He went on to argue that "divorce is a positive good", a cure, rather than a disease, and made this assertion on the basis of his experiences of thirty years as a lawyer. Finally, he challenged those who suggest that marriage should be regarded as strictly indissoluble.

> This is a view that has come to us through the medieval church, which gradually closed the front door of divorce while at the same time it was opening the back door of annulment.... I submit that a course such as this is sheer dishonesty.[15]

Cartwright raised a particular objection to the

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[14] Cartwright. "Grounds for divorce: two years apart," Maclean's. March 1, 1958, 8,44-5.

[15] Ibid., 45.

traditional focus by the church and state on the act of adultery.[16] "It is taking a rather low view of marriage to say that sexual intercourse is the one thing that matters." Instead, he suggested that it was futile to specify any particular marital offence as grounds for divorce. "When I have tried to get to the bottom of things to see what is the real cause of the breakdown of the marriage, I have normally come to the conclusion either that both were at fault or that neither were."[17] He therefore took the same position that a minority of a British royal commission took in 1955, that divorces should be granted on a no-fault basis after the couple had separated for a specified length of time.

While Casserley argued that the individual's pursuit of happiness was undermining everyone's ability to achieve satisfying lives, Cartwright said "that our object should be to permit the maximum of happiness and freedom to the individual so long as society as a whole is not harmed."[18] The former asserted that there is a divine order and that we can gain nothing by deviating from it. The latter recognized no such order and saw such an argument as an attempt to

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[16] Two United Church ministers made the same objection, relying on sociological evidence, in magazine columns. See Ray Goodall, "Let's Disqualify Adultery as Grounds for Divorce," Maclean's. July 1, 1961, 8,37; and J.A. Davidson, "Our Squalid Handling of Divorce," Saturday Night. Jan.9, 1960, 10.

[17] Ibid., 44-5.

[18] Ibid., 45.

reassert clerical authority.

The next contribution to this debate came from two professors of canon law in Revue de l'Universite d'Ottawa.[19] The archconservative nature of their arguments is perhaps predictable, but they are worth examining as one of the last expressions of the traditional Catholic view of society before the liberal reforms of the Second Vatican Council. Paul-Henri Lafontaine's article critiqued Carwright's history of divorce, while Raymond Chaput aimed to set the record straight on the canon law on divorce. Lafontaine could be accused of being petty, beginning with his title -- "Mr. H.L. Cartwright Promotes Divorce, in 'Maclean's' or How Not to Write History" -- and moving on to such things as the exact circumstances under which Napoleon received an annulment, and the difference between the terms annulment and decree of nullity. He also attacked Cartwright for using a secondary source rather than going to primary documents, and for misattributing the words of one historian to another. None of this came close to refuting Cartwright's main historical argument: that Western society has always allowed divorce (although sometimes choosing to call it separation, annulment or decree of nullity).

Chaput extended this discussion by providing more

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[19] Paul-Henri Lafontaine. "Mr. H.L. Cartwright Promotes Divorce, in 'Maclean's' or How Not to Write History," and Raymond Chaput, "The Christian Doctrine of Indissolubility," Revue de l'Universite d'Ottawa. 28. avril-juin 1958, 226-46.

details on the canon law regarding the indissolubility of marriage, and the conditions under which it may be dissolved. Beyond the semantics of his argument, he made two points worth noting. One was that indissolubility applied not only to baptized Christians, but all human marriages. He argued that indissolubility was divine and natural law, and that it was folly to ignore it.[20] This put Catholic doctrine in conflict with the liberal notion that people are free to practice their faith as long as they do not try to impose it on others. Second, Chaput, like Casserley, argued that marriage had more to do with social responsibility than individual happiness:

> He [Cartwright] seems satisfied that the aims of marriage should be limited to procuring a positive advantage to the individual while merely being of negative value to society, that is to say, harmless. But since marriage is essentially a social institution, of which the basic aim is to create first the society of the family, and through it the structuring of society as a whole, any view of marriage which does not seek a positive good for society, as well as a positive good for the individual, is obviously unrealistic.[21]

Once, again the argument was put forth that people need a stable social order, and society must maintain laws which support such stability. Liberal divorce laws would only undermine such order.

It is doubtful that when most Canadians thought about divorce laws at all that they considered the issue in such

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[20] Chaput, "The Christian Doctrine of Indissolubility," 240-2.

[21] Ibid., 239.

intellectual terms, regarding the relationship between the individual and society. Instead, it is more likely that public opinion was shaped by a raft of media stories, particularly in 1960, which showed the law was failing to serve any useful purpose and even ridiculed the law by showing how commonly it was circumvented. Perhaps the best example of this type of story was an interview done on CBC-TV's weekly current affairs program "Close-Up." On May 26, 1960, June Callwood interviewed a "professional co-respondent," a woman who helped couples fabricate evidence of adultery by posing as "the other woman" for a fee.

The show received some advance publicity when opposition from clergy and other influential citizens, including Sen. Muriel Ferguson, resulted in the broadcast being postponed. But eventually the show went ahead, airing an interview that apparently had more to do with trivial, sensational details of the life of a co-respondent, than anything to do with divorce law in Canada. As Jack Batten described the interview in Canadian Forum:

> ...it managed to mention, in less than thirty minutes, "Lolita" (the interviewee liked it), cocktail bars (she refused to meet her clients in them), states of undress (she usually took her dress off to make the evidence look right), and, naturally, adultery (she never committed it).[22]

The woman also said she had been involved in about 120 divorces during her four years in the business, charging

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[22] Jack Batten, "Two Notes on Public Morality," Canadian Forum. July 1960, 74.

$100 each time. She added that she knew of other women who charged $150, but for that price "you're entitled to stay the night."[23]

The interview became a front-page story in some newspapers the next day, describing various reactions to the show. The head of the Law Society of Upper Canada, John J. Robinette, and two "prominent" divorce lawyers claimed to have never heard of evidence being fabricated in divorce cases. The Ontario attorney general promised to investigate the possibility of laying perjury charges against the co-respondent. And Sen. Roebuck, chairman of the Senate committee on divorce, objected to the program's suggestion that this practice is common.[24]

The show also raised the ire of some public figures who objected to the broadcasting of such lurid information. Charlotte Whitton, former mayor of Ottawa, called the show "decadent and revolting." She protested to the lack of seriousness with which the subject was dealt. F.W.L. Bailey, a United Church minister and a member of the church's commission on marriage and divorce, said, "It's brazen of the CBC to present this and by doing so, they've become an accessory to the crime." June Callwood, on the other hand,

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[23] "Tells How Proof Faked In Divorce," Ottawa Journal. May 27, 1960, 2.

[24] "'Self-Confessed Perjury' -- Roberts," Toronto Daily Star. May 27 1960, 1,2.

was unapologetic, and said the law "just doesn't work."[25]

To some observers, the complaints of moral watchdogs were drawing attention away from the more important issues which the show should have raised. Jack Batten wrote, "Everyone, it seemed, complained about everything except the law that apparently makes 'professional corespondents' necessary."[26] But for the editors of the Toronto Star, the show did raise an issue which parliament would eventually have to address. It asked, "How can public respect for law survive such widespread, ceaseless, cynical and successful cheating of the law?"[27]

The furious reaction to the show is perhaps surprising considering the business of co-respondents was not news. The print media had dealt with the issue before, and reformers in parliament had referred to the practice to support their arguments. David Croll, for instance, in introducing his motion to the house in 1950 read from a 1947 Globe and Mail article that was guilty of focussing on the same type of sensational details as the "Close-Up" interview was.

> Her work uniform was always a neat dress, well-fit and worn over a black slip with lace inserts in the bodice. During the war she used to knit for the soldiers in her spare time and she always carried her knitting when co-responding.

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[25] Ibid.

[26] Batten, "Two Notes on Public Morality," 74.

[27] "Divorce by Perjury," Toronto Daily Star. May 27, 1960, 6. Another editorial on the subject appeared under "Notes and Comments," Ottawa Journal. May 28, 1960, 6.

> On reaching her assignment usually a hotel bedroom, Evangeline would speak to her client in a tone designed to put him at ease, remove her dress and get into bed with her knitting.
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> When the knock came she would shove the knitting under the pillow and when she reared up on her elbow in the fetching black slip the law student, who in his own way was trying to earn an extra dollar, had the ready made description of a scene that could be, and frequently was described as a love nest.[28]

Apparently, the CBC interview is a testimony to the power of television to garner greater public interest for an issue than the press.

Another type of story which ridiculed the divorce laws was those of writers who came forward with their own stories of collusion and perjury. Catherine Jones even started off her 1960 story in Maclean's: "Now that everybody is rushing forward to confess collusion in obtaining divorces, I feel impelled to do a little confessing myself." She went on to describe how she helped two friends get a divorce by volunteering to "catch" the husband in a hotel room with another woman, and then stand as a witness in court. The article was written in a light-hearted tone which suggests the writer and her friends enjoyed, to some extent, fooling the justice system. In justifying the tone of her article, Jones wrote, "I know that most divorce cases aren't funny. But I also know there is a light side to some and that the

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[28] Kenneth Cragg. "Divorce Headache," Globe and Mail. May 6, 1947, 15. These paragraphs were quoted by David Croll, Commons. 1950, 1580. For another example of this type of article, see "I Fake Divorce Evidence for a Living," Star Weekly. Oct.10, 1959.

law governing all of them is a joke."[29]

Similar personal confessions were made by novelist Arthur Hailey in 1963. He wrote in Maclean's that he paid for his wife to go to the United States and get a divorce. A lawyer coached them in the methods of perjury and collusion for the purpose of making a successful case. Hailey subsequently went to Buffalo to remarry. Neither his divorce nor his remarriage had any legal significance under Canadian law. Based on this experience, he gave the following set of observations and advice:

> Thousands of troubled Canadians whose lives are blighted by our tragi-comic marriage and divorce laws should be told, bluntly and publicly, to subvert the law where they can and, where they cannot, to ignore the law entirely.
>
> By subverting the law I mean that those who seek divorce should continue the time acknowledged custom of collusion and staged adultery.
>
> And by ignoring the law (where divorce is impossible) I suggest that two people who cannot otherwise marry should live together in what used to be known as "sin." It happens, and it works.
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> Neither proposal is something to be taken lightly. Whatever one's personal beliefs -- agnostic or religious -- marriage is a basic pillar of any ordered society, and respect for the law is inherent in our way of life. But more and more in Canada, in the area of divorce and remarriage, "anything goes" because human needs and social mores have long since left the law behind.[30]

The article remarks that the practice of getting a foreign divorce and remarriage was socially acceptable, an assertion

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[29] Jones, "My Brief Career as a Divorce Detective," Maclean's. Sept. 10, 1960, 20.

[30] Hailey. "Some People Should Live in 'Sin'," Maclean's. Jan.5, 1963, 24.

which Cartwright made five years earlier. But Hailey argued that this route was not worth the time and expense, and suggested instead that people simply live common-law and tell everyone that they remarried abroad. He acknowledged that this is an unattractive option, but, he argued, separated people faced some bleak alternatives: "...when you're up against Canadian divorce law you make your choice -- you live a lie or abandon normal living altogether."[31]

Beyond the tales of collusion and personal hardship, these stories attest to the growing social acceptability of flouting the divorce laws. By the early 1960s a gap had developed between the law and social attitudes to divorce in Canada. The pull of the old Christian tradition was still there though it was growing weaker, and almost certainly people were concerned that the institution of marriage would lose its life-long character. And tradition still had powerful advocates. Overall though, opinion was growing to the effect that the law no longer served people's needs, but was instead an obstacle to be overcome somehow. In a utilitarian age, it lacked utility.

Hailey understood the advocates of the Christian tradition, and their position in Canadian politics. A major portion of his article argued that the divorce law was an unchangeable fact of Canadian life, and that it was folly to wait for parliament to reform the law. He said the reason it

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[31] Ibid., 30.

would never change was Quebec, and the powerful Catholic bloc it represented. A more academic discussion of this issue was published in 1957 by political scientist J. Murray Beck. He argued that among the group rights guaranteed by the British North America Act was divorce for protestants in Quebec. By giving jurisdiction over divorce law to the federal government instead of the provinces, the protestant minority in Quebec would always have an avenue for securing a divorce. According to George Etienne Cartier this was the intention behind the odd decision to give provinces power over marriage law, and Ottawa power over divorce. In explaining this to parliament in 1870, Cartier said that he hoped the MPs would understand this constitutional provision was made only for protestants, and therefore any Catholic petitioners should have their request refused.[32]

Since that time, Catholic parliamentarians showed remarkable consistency in opposing any change to the divorce laws which had the possibility of increasing the numbers of divorce. As Beck showed, the few minor changes that were made over the years (such as giving women equal opportunity to petition for divorce in 1925, or creating a divorce court for Ontario in 1930) were opposed by all but one or two Catholic members. And the increasingly onerous workload of the Senate divorce committee was born entirely by non-

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[32] Beck. "The Canadian Parliament and Divorce," Canadian Journal of Economics and Political Science. 23. August 1957, 297.

Catholics. Their only participation in the private bills, which their religious doctrine made necessary, was to occasionally shout "on division" for the unrecorded votes. Thus, Beck argued, when parliament dealt with the issue of divorce, Catholics MPs took on the limited role of spokesmen for a particular religious faith. Finding a new way of dealing with divorce in Quebec and Newfoundland would be beneficial "if only to avoid the constant overt demonstration of the religious cleavage among Canadian parliamentarians."[33]

Beck suggested two alternatives. One was that the Superior Court of Quebec take on the task of deciding whether or not adultery had been committed before it granted a judicial separation.[34]. Parliament could then pass a divorce bill without further investigation. The second choice was that the Senate appoint officers to investigate the charge of adultery, and on their recommendation the Senate would approve the petition.[35] The latter suggestion was eventually adopted by parliament in 1963, but only after a long, intense campaign by a few MPs.

Throughout the 1950s, some members of the CCF caucus

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[33] Ibid., 309-10.

[34] A judicial separation -- the only kind Quebec courts could grant -- gave the couple a legal separation "from bed and board." It effectively dissolved the marriage "without conferring on the parties the right to remarriage." Report, 55.

[35] Ibid., 311-2.

continued to try to embarrass the government into changing the procedure for private divorce bills by singling out a few bills with contradictory evidence. Some, including the editors of the Globe and Mail[36] objected to this tactic as simply obstructing the business of the House. But the MPs involved held to their argument that parliament was ill-suited to the quasi-judicial function foisted on it. And there were indeed serious implications if parliament erred. This was shown in 1958 when a woman charged with adultery appeared before a parliamentary committee to plead her innocence. Two CCF MPs, Arnold Peters and Murdo Martin, became suspicious that the husband was trying to frame his wife in an attempt to bilk her out of a million-dollar construction company that she had brought into the marriage. When they moved to block the bill's passage, they were each offered a bribe of $5,000 by the husband.[37] In the following years, Peters became one of the most active supporters of divorce reform.

But a Tory government under Diefenbaker, vitally interested in holding on to its 1958 electoral success in Quebec, was no more interested in alienating that province than were the Liberals. Peters decided to try to force the

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[36] "Parliament's Garrulous Octet," Globe and Mail. Aug.18, 1958, 6.

[37] Stanley Westall. "After a 4-Year Courtship, the Commons Accepts a Proposal to Give Up Divorce," Globe and Mail. Aug.2, 1963, 1.

government's hand by using the old CCF tactic of blockading divorce bills. On March 1, 1960, Peters refused to allow the private bills to be passed en bloc, and began asking the bills' sponsor questions regarding the involvement of private detectives in certain cases. Such questions were not simply a way of running the clock down (the time allotted for private bills was only one hour on certain days of the week) but were an attempt to uncover collusive activity and the practices of professional co-respondents. The following week, Peters was joined by his CCF colleague Frank Howard, forming a team which would continue to use the tactic of blockade, off and on, over the next three years.[38]

Stanley Knowles's blockade in 1951 had proved to be an unmitigated failure, but by 1960 there was greater interest in or at least acceptance of the idea of divorce reform. The most significant move made by the media was not coverage of the filibuster in parliament itself, but the "Close-Up" interview which aired two and a half months into the blockade. Peters singled out this story as one of the ones which indicated growing public awareness not only of the problems of parliamentary divorce, but the need for broader legal grounds.[39]

The CCF pair were denounced by several members of the

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[38] Commons. 1960, 1601. Also John T. Saywell, ed., Canadian Annual Review for 1960. Toronto: University of Toronto Press, 1961, 13-4.

[39] Ibid., 1960, 7765.

House for their action. Many were angry because they were unable to get their private members' bills (for example, bills of incorporation) through because of the time taken up by the filibuster. Howard and Peters often faced the charge that their action was only hurting the people they intended to help, those in Quebec and Newfoundland who sought a divorce. Robert McCleave, the sponsor of the divorce bills, claimed that one woman lost her sanity because her petition for divorce was being blocked.[40] Finally, on August 9, at the end of the parliamentary session, they relented temporarily and about 400 bills were passed en bloc.

When parliament resumed in November, the blockade began again. Hope for a solution to the deadlock arose in December when M. Morton (PC) introduced a bill that would have given the Senate sole responsibility for divorce petitions. The bill passed quickly through the House on Dec. 16, but when no-one in the Senate was willing to sponsor it, the bill died.[41] Then when the session was about to end in Sept. 1961, Gordon Churchill (government House leader) asked that the remaining divorce bills be passed and stated that the government hoped to introduce a solution to the problem of parliamentary divorce in the next session. Again Howard and Peters relented and about 350 bills were passed under one

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[40] Ibid., 7774-82.

[41] Canadian Annual Review. 1960, 69; 1961, 9.

motion.[42]

The government could perhaps be forgiven for thinking that a pattern had formed whereby, despite any lack of progress on the issue, all but a few questionable divorce petitions would be allowed to pass at the end of the session. However, in 1962 Howard and Peters saw no serious intention by the government to resolve the situation and therefore refused to relent at the end of the session. In the final hour in the House before the closing of the Twenty-Fourth Parliament, Prime Minister John Diefenbaker asked the members to allow the 327 divorce bills on the order paper to pass. Howard refused. McCleave, once again, expressed his moral indignation in the strongest terms possible:

> In these [divorce] cases which I have on my desk there are a number in which unless we grant divorces today children will be born illegitimate. I think it would be a shame if any one of us went forth from here having put that stigma on children.[43]

Such warnings were to no avail. Following the Conservative government's re-election, the blockade continued. Another attempt was made to make divorce petitions the sole responsibility of the Senate. A bill to this effect was introduced by Tory backbencher Nicholas Mandziuk. Howard and Peters objected to a clause in the bill which said the House would be an avenue of appeal in divorce

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[42] Commons. 1960-61, 8865.

[43] Ibid. 1962, 3124.

cases, and the bill eventually died on the order paper.[44] But by this time it was clear that a solution along this lines had the best possibility of succeeding.

Pressure was now building from within Howard's and Peter's own party to end the blockade. A majority of the recently-created New Democratic Party's caucus were opposed to the action. The duo were told to resolve the conflict within a year or drop it.[45] Nevertheless, they stood their ground through until the fall of the Diefenbaker government in February 1963. During the brief Twenty-Fifth Parliament, the Senate passed on almost 500 divorce bills to the House, only 12 of which were ever discussed by MPs.

With the election of a minority Liberal government in 1963, a solution was finally reached. The Dissolution and Annulment of Marriages Act, which passed on August 2, empowered the Senate to hire divorce commissioners who would consider the evidence of each petition. The Senate then acted as a virtual rubber stamp and, provided no objections were filed, the divorce became final thirty days afterward. Peters, in ending the blockade, said that he was confident the semi-judicial agency created by the bill would do a reasonable job of handling divorce cases. MP Reid Scott was alone in citing the main shortcoming of the bill -- no

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[44] Paul Larocque. The Evolution of the Canadian Divorce Law: A Study of the Policy and Process in Canada. unpublished M.A. thesis. Queen's University, 1969, 29.

[45] Ibid., 39.

extension of grounds -- but he was nevertheless willing to support it as a step in the right direction.[46]

In the late 1950s and early 1960s, Canada's divorce laws were held up to widespread public scrutiny, perhaps for the first time, and were found wanting. The growing numbers of separated and divorced Canadians (see Table 1) forced more people to consider the subject. The media, including the powerful new medium of television, was showing the country the effective breakdown of laws that no longer met the needs of a secular society. The gap between the public and parliament on the issue of divorce was growing. According to Gallup, the number of Canadians who felt it was too difficult to get a divorce in Canada rose from 35 per cent in 1950 to 50 per cent in 1963.[47] That year, Catholic MPs may have thought that by making a minor concession they would defuse the political pressure for more substantive reform. Instead, that act uncovered the chink in the armour. It did not mean that defeat of the old divorce laws were inevitable, but it did suggest to many in the political elite that profound change was possible.

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[46] Commons. 1963, 2900-2.

[47] Canadian Institute of Public Opinion. Oct. 9, 1963.

CHAPTER THREE

REFORMING THE LAW: THE DEBATE ON THE ROLE OF THE STATE IN FAMILY LIFE

By the mid 1960s, opposition to liberalization of Canada's divorce laws was dissipating. Many churches were debating broader legal grounds. The Quiet Revolution in Quebec was bringing a new secular attitude into the province's politics. Ottawa no longer had any reason to block attempts by reformers to change the law. In this final phase of the reform process, debate quickly moved from whether or not the law should be liberalized to the question of what the new law should be.

First, it would be useful to observe some of the societal changes underway in the mid 1960s which favoured divorce reform. As discussed in the last chapter, the growing perception that the divorce laws were a farce was a major incentive for the political elites, whose power rested on respect for the law, to move on this issue. Related to this was the growing incidence of common-law marriages and foreign divorces and remarriages, which also undermined the power of the Canadian state to regulate marital life. Estimates of the number of Canadians living in common-law relationships ranged from fifty thousand to half a million.[1] Although the basis for these estimates was vague,

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[1] See Pierre Trudeau's speech on second reading of the bill in Commons, 1967, 5084; Sen. Roebuck, co-chairman of the parliamentary committee on divorce, estimated fifty to one hundred thousand in Alan Edmonds, "What Easier Divorce

it helped to make the point that the official Canadian divorce statistics represented only the tip of the iceberg. What the statistics left unseen was the massive number of broken marriages and "irregular" marriages which the law did not recognize. Canada's failure to keep up with other Western countries in the area of divorce law probably resulted in a higher number of common-law marriages. As these types of relationships became more frequent, especially among the middle class, they likely gained broader -- but not general -- social acceptance. A 1965 article in the Star Weekly described the attitudes one such couple faced in this way:

> Vicki's neighbours may have gossiped, but they were kind. Her parents accepted Bill when they saw how good he was to their grandchildren. Their landlord, the principal at the school the children attend, Bill's employer, all know and accept the common-law relationship.[2]

One suspects that most common-law couples were not in such a relatively happy situation. In fact, many Canadians were going to great pains to establish the respectability of their new relationships. What Canadian law denied them, some American states and Mexico could provide. These foreign divorces and remarriages had no legal recognition in Canada, but Canadian society was apparently more understanding. There are few hard statistics on this practice but what

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Will Do to Canada," Maclean's, Sept. 1967, 1.

[2] Constance Mungall. "Respectable Canadians Who Live in Sin," Star Weekly. July 24, 1965, 25.

there are indicate that more Canadians were getting divorced south of the 49th parallel than north of it. As early as 1922, 1,400 divorces were granted to Canadians in American states. An American study of these figures suggested that about 1,000 of these were of an "evasive migratory nature," i.e., they represented people who could not get a divorce in Canada. This number is almost double the divorces granted in Canada that year (543).[3]

In addition to the Hailey and Cartwright articles in Maclean's (mentioned in the previous chapter) which both mentioned the social acceptance of foreign divorce and remarriage, another article in the same magazine in 1966 described the popularity of Mexican divorces. Journalist Alan Edmonds, although happily married, went to Mexico to obtain a divorce for the sake of documenting how easy and how legally worthless it was. He wrote that despite the fact a Mexican divorce decree was just "an expensive piece of toilet paper in Canada," the Mexican divorce mill still flourished as the last hope for many Canadians "because Canadian divorce laws remain unchanged to fit some long gone ideal of marriage." The article also observed that the number of Canadians going to Mexico for divorces was apparently on the increase. Mexican lawyers were increasing their efforts to get Canadian customers to make up for the

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[3] Robert Pike. "Legal Access and the Incidence of Divorce in Canada: A Sociohistorical Analysis," Canadian Review of Sociology and Anthropology. 12. 1975, 121.

lost business from New Yorkers (New York liberalized its divorce laws earlier that year).[4]

The important point is that there was no legal reason for such a practice to exist. In theory, many of these foreign remarriages constituted bigamy in Canada, but legal authorities did not pursue the issue. The only reason for foreign divorce and remarriage was that it provided social respectability in Canada which common-law arrangements did not.

In addition to this routine disregard of Canadian law, general changes in family life were altering the institution of marriage. The rising numbers of married women in the work force, and the financial independence that went with it, was increasing women's options, and was likely responsible in part for the rising divorce rate. Women were also becoming more aware of the unequal position of men and women in divorce. A 1964 article in Chatelaine described the weak legal position that women were in when their marriages broke up and speculated about the benefits of prenuptial contracts.[5] Also the liberal attitudes of the 1960s furthered the trend towards self-fulfillment as the central purpose in the life of the individual. As one historian of divorce put it, "The increasing emphasis on the married

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[4] Alan Edmonds. "Divorce, Mexican Style," Maclean's. June 18, 1966, 18-9.

[5] Mollie Gillen. "Should You Have a Marriage Contract," Chatelaine. Nov. 1964, 29,78-82.

couple's emotional relationship, rather than on their economic or parental roles, has produced intense demands on just that aspect of marriage which is arguably the most fragile."[6]

These changing attitudes resulted in a steady rise of the divorce rate even before the laws were reformed. From the turn of the century, when there were only about a dozen divorces annually, the numbers grew into the thousands by the late 1930s, and crossed the ten-thousand mark by 1966. The rate of divorce per one hundred thousand population grew from just below 40 during the 1950s to over 50 by the late 1960s (see Table 1). And these figures only count legal divorces. This strengthens the argument that popular support for liberalized divorce laws was far in advance of elite institutions such as parliament.

When parliament did act on the divorce issue, the initiative came from the Senate and the backbenches of the Commons, not the executive. The norms of policy-making were turned upside down.[7] This can be seen from the earliest changes to the divorce laws. The 1925 Marriage and Divorce Act, which made the grounds for divorce equal for men and women, was the result of pressure from western backbenchers. And when a federal act gave Ontario courts jurisdiction over

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[6] Phillips. Putting Asunder. 621-3.

[7] Paul Larocque. The Evolution of the Canadian Divorce Law: A Study of the Policy Process in Canada. unpublished M.A. thesis, Queen's University, 1969, p.77 and passim.

divorce in 1930, it was largely due to pressure exerted on the government by the Senate and an opposition MP, J.S. Woodsworth.[8] The cabinet played either a passive role, allowing changes to go ahead without becoming directly associated with them, or a negative role, using its authority to stop a motion for reform. Thus, within the time frame of this study, divorce reform was promoted by government backbencher David Croll, opposition MPs Stanley Knowles, Frank Howard and Arnold Peters or members of the Senate divorce committee. The government either: exercised a veto, as St. Laurent did with Knowles's Exchequer Court bill; negotiated with reform advocates, as the Diefenbaker government did with Howard and Peters; or took little or no action as events ran their course. Positive action by the executive was rare but did occur, as when Prime Minister Lester Pearson assigned three members of his cabinet to resolve the divorce bill blockade in 1963, resulting in the Dissolution and Annulment of Marriages Act.[9]

After this act passed, MPs and Senators were largely removed from the distasteful procedure of parliamentary divorce, and the issue was rarely discussed over the next few years. Nevertheless, evidence suggests that the federal cabinet was now aware that the politics surrounding the

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[8] Beck, "The Canadian Parliament and Divorce," 301-2.

[9] Larocque, The Evolution of the Canadian Divorce Law. 29.

issue of divorce had changed. The cabinet's resistance to divorce reform, from Macdonald to Diefenbaker, was based on fear of the damage it would do to national unity. St. Laurent's statement, during the debate on Knowles's bill in 1951, suggested the federal government subscribed to a principle of concurrent majorities on divorce reform; the protestant majority would not liberalize the divorce law as long as the Catholic minority opposed it.[10]

It was precisely this opposition that was diminishing in the 1960s. The cabinet knew it and therefore no longer saw a reason to block divorce reform, when it was proposed. Guy Favreau, a Quebec member of Pearson's government who was personally in favour of broadening the grounds, contacted the Catholic bishops in his province to find out how they might react to a liberalization of the law. Apparently, he found that they were no longer interested in wielding the kind of influence on such matters of public legislation as they had before[11] (a position they would later state to a parliamentary committee). Still, the government left the initiative to the backbenchers, who made their move in 1966 when seven private bills for divorce reform were presented in one session. The government responded by striking a joint

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[10] Beck, "The Canadian Parliament and Divorce," 298-9; Larocque, Evolution of the Canadian Divorce Law, 4.

[11] Larocque, Evolution of the Candian Divorce Law, 42. This is what Favreau confided to Peters, which Peters latter related to Larocque.

committee of Senators and MPs which led to the Divorce Act of 1968.

The question that the committee dealt with was not whether to reform the divorce law, but instead, how the new law should operate. There were two general models which the committee had to choose between. One was the traditional concept of marital offences, where the legislation enumerated a list of grounds (such as adultery, cruelty, and desertion) and divorces were granted where one of these offences could be proven. But governments around the world had for decades been expanding the list of offences without creating any real improvement in their regulation of divorce. So the alternative model of "marriage breakdown" began to gain currency in the 1960s. Here the state would simply recognize that a marriage had broken down, without pinning the blame on one spouse or another.

This concept emerged out of social scientific arguments which stated that marital offences such as adultery were symptoms not causes of marriage breakdown. Causes derived from conflicting personalities and other problems that were not the fault of one spouse or the other. While this argument had been discussed for decades, it was not until the 1960s that the concept gained widespread acceptance among clerics and legislators.[12]

The offence-versus-breakdown debate was at the centre

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[12] Phillips, Putting Asunder, 566.

of two prominent studies in Britain which influenced divorce-law reformers in Canada. The first was the 1956 report of the Royal Commission on Marriage and Divorce in which a minority of the commissioners favoured the adoption of the marriage breakdown model in British law, but the majority recommended broadening the list of marital offences.[13] The other was a study commissioned by the Archbishop of Canterbury in 1964 which published its report two years later titled Putting Asunder, whole-heartedly advocating the concept of marriage breakdown.[14]

The two sides in the debate were divided by issues of theory and practice. While the breakdown model was good in theory, there was one major problem with its practical application. This was the challenge it presented to judicial tradition. What criteria were judges to use to decide whether or not a marriage had broken down? In the adversarial tradition of British justice, courts are designed to investigate guilt and innocence. How could they now make decisions in cases where it was said that no one was at fault?

A few months before the joint committee began its meetings, a legal view of the debate was published in the Canadian Bar Journal. Calgary lawyer Douglas Fitch argued in

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[13] See Royal Commission on Marriage and Divorce, 1951-1955. London: Her Majesty's Stationery Office, 1956.

[14] Putting Asunder: A Divorce Law for Contemporary Society. London: S.P.C.K., 1966.

favour of abandoning marital offences in favour of the breakdown concept. Broadening the grounds had proven to be a pointless exercise, creating an increasingly-specific list of offences, he argued. Legislators in the U.S. had considered such grounds as "public defamation of the other", "joining a religious sect believing cohabitation unlawful", and "refusal by wife to move to new residence."[15] Fitch observed that governments in Australia, New Zealand, Scandinavia and fifteen American states, compromised the breakdown concept by writing laws which simply incorporated "marriage breakdown" as one more in the list of marital offences. He objected to this because breakdown was not an offence. The idea was to get away from the false notion that one spouse could be blamed for the failure of the marriage.[16]

The proof of marriage breakdown according to Fitch should be separation for a reasonable length of time (he suggested three to five years). He listed several advantages to this. For one, it would put an end to "quickie divorces," where couples who are capable of proving an offence could sometimes have their divorce granted within a week of filing. Another reason was since divorce often required the co-operation of both spouses to prove adultery had been

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[15] Douglas F. Fitch. "As Grounds for Divorce, Let's Abolish Matrimonial Offences," Canadian Bar Journal. 9. April 1966, 82.

[16] Ibid., 84.

committed, breakdown would largely eliminate divorce by mutual consent of the spouses.

In making his argument, Fitch faced the same problems as other advocates of marriage breakdown. One was the difficulty of defining divorce by consent. It was important for Fitch to differentiate between divorce by consent and marriage breakdown as he, like other elites, did not want to allow couples to decide the fate of their marriages by themselves without any regulatory role by the state. He claimed that there was no similarity between the two concepts. "In 'marriage breakdown' the state in effect says 'no divorce until we are quite certain the marriage has permanently broken down' and after the lapse of years the state permits either party to obtain the divorce,..."[17] And yet how can the state be satisfied that the marriage has broken down if there are no accepted grounds on which courts can put the issue to a trial? At the end of his article, Fitch clarifies this point by backtracking on his opposition to marital offences. He wrote that while an offence should not be the sole basis for granting a divorce, "nevertheless it has a probative value as tending to show that a marriage is broken down." To this end, he proposed that marriage breakdown be proven either by a period of separation "or where the defendant has committed adultery or extreme

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[17] Ibid.

cruelty."[18] This confusion of breakdown and offence concepts, and the practical difference between breakdown and divorce by consent were at the heart of the debate directed by the joint committee.

Among the most prominent witnesses the committee heard from were the churches. By the mid 1960s, most major churches in Canada had dealt with the question of divorce reform. This was part of a general phase of self-criticism and re-examination that organized Christianity faced during a decade of radical social thought. The churches had come out of the expansionism of the 1950s and into a new critical era. The need was acknowledged inside and outside the churches that change was needed to maintain, or even regain relevance.[19]

As we have seen, the United Church began a thorough study of the issue of marriage and divorce in the 1950s. Two other major tasks were taking place at the same time. The church was redeveloping its curriculum of Christian education, and negotiating union with the Anglican Church. In the early 1960s, the new curriculum was being introduced over the protest of conservative members of the church, and in 1965-66 the United and Anglican churches agreed to the principles of union. This event overshadowed the final step

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[18] Ibid., 92.

[19] John Webster Grant. The Church in the Canadian Era: The First Century of Confederation. Toronto: McGraw-Hill Ryerson, 1972, 184-206.

of United Church policy on divorce law reform -- the abandonment of marital offences in favour of the marriage breakdown concept.[20]

The Anglicans, while pursuing their goal of union with the United Church, were also responsible for commissioning the publication of a highly controversial and popular attack on themselves and organized religion in general. Following a series of discussions between Anglicans and agnostics, well-known author and lapsed-Anglican Pierre Berton was asked to publish his views. The result, The Comfortable Pew, asserted that the churches had failed to grapple with the fundamental questions of the age (for example, issues of war and racism) and had been reduced to social clubs which reflected people's accepted notions, rather than challenging them.[21] On the issue of divorce law, the church may have been inspired by the Archbishop of Canterbury's approval of the marriage breakdown concept in 1966, but the Canadian communion had no official policy. However, the first step toward liberalizing the canon law was made in 1965 when the General Synod proposed allowing remarriage for divorced people (this proposal was finalized in 1967).

The Catholic Church was undergoing the most fundamental

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[20] The resolution was passed unanimously by the Twenty-Second General Council in 1966.

[21] Pierre Berton. The Comfortable Pew: A Critical Look at Christianity and the Religious Establishment. Toronto: McClelland and Stewart, 1965, 30 and passim.

process of re-examination, through the Second Vatican Council, which met in several sessions from 1962 to 1966. Of the various reforms the council brought in, the most relevant to this study was the church's abandonment of the belief that the church played a pre-eminent role in society. This acceptance of secular and pluralist principles by the Catholic hierarchy played an important part in the Quiet Revolution that was transforming Quebec. Catholic parliamentarians could no longer claim that they were not allowed to participate in any legislation concerning divorce. The Catholic bishops' brief to the joint committee said it had no intention of forcing its views on society as a whole, and called on Catholic legislators to act according to their own consciences. Interpreting the position of Vatican II, the brief stated,

> He [the legislator] should not stand idly by waiting for the Church to tell him what to do in the political order. The ultimate responsible conclusions are his own as he fulfills the task he has along with all other legislators. That task is the promotion of the common good through the provision of wise and just laws.[22]

An equally key statement was the bishops' assertion that, while indissolubility of marriage remained a Catholic belief, the general good of society was served by a law which allowed divorce in certain circumstances and "we would not object to some revision of Canadian divorce laws that is

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[22] Proceedings of the Special Joint Committee of the Senate and House of Commons on Divorce, 1966-7. Ottawa: Queen's Printer, 1967, 1515. Hereafter referred to as Proceedings.

truly directed to advancing the common good of civil society."[23]

The bishops declined to give any specific recommendations for a new law, but did say that it should be part of a broad policy to "strengthen family values." So as the Catholic hierarchy publicly accepted a liberalized divorce law, it emphasized a policy of prevention. To this end, they suggested more research into marriage and the family, the development of programs for such things as pre-marital preparation, and the establishment of public agencies to support troubled homes.[24] These suggestions showed faith in the social sciences and a desire for the state to become more actively involved in solutions to family problems.[25]

This was similar to the ideas expressed by other churches to the joint committee. While they differed on the marital offence and marriage breakdown concepts, there was consensus on the need to change the law, to apply social

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[23] Ibid., 1512.

[24] Ibid., 1513.

[25] The change in the Catholic position is striking when one observes in a conservative publication like Relations, which once scoffed at divorce as contrary to natural law, by 1968 trumpeting the position the bishops had taken. But in the Quiet Revolution, the growth of secularism also meant the growth of nationalism. While Relations supported the liberalization of divorce laws, it insisted that Quebec gain jurisdiction over all aspects of marriage and divorce. See Marcel Marcotte, "Vers une nouvelle loi du divorce," janvier 1968, 2-3.

scientific research to prevention and reconciliation of troubled marriages, and to avoid divorce by mutual consent of the spouses.

The objections to the current law were many. First, the overly restrictive grounds for divorce were blamed for creating undue hardship for many Canadians and even harming the sanctity of marriage. The widespread use of perjury to obtain a divorce was recognized by many witnesses before the committee. Also, the growing number of common-law marriages in Canada was attributed to the law, and it was hoped that a new law would allow these couples to "legitimize" their relationships.[26] As one witness stated, "...living in common-law engenders lack of respect for the law and the marriage state."[27] Thus, a new law could bring these people within societal norms and make their relationships subject to regulation by the state. Finally, all the religious organizations recognized that the current law was based on a Christian teaching which should not be forced on non-Christians.[28]

Witnesses who favoured the marriage breakdown concept went further in their objections to the law. They argued

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[26] Ibid., Two examples of this argument are in the United and Anglican presentations. 350, 1105.

[27] Ibid., Brief by National Council of Women of Canada, 611.

[28] Ibid. For example, see briefs by the Baptist Federation of Canada and the Orthodox Church. 572, 1368.

that marital offence laws had been discredited by social science. Marital offences represented symptoms, not causes of troubled marriages. A broken marriage could not realistically be blamed on one spouse or the other. Instead, both spouses should be made to recognize their responsibility for the problems in their relationship. But the current law reinforced "the fiction of the guilty party."[29] Furthermore, it encouraged animosity between the spouses, because one had to prove the other one guilty. A new divorce law should instead encourage reconciliation and forgiveness.[30] The Church of England report summed up the superiority of this model in this way:

> ...a divorce law founded on the doctrine of breakdown would not only accord better with social realities than the present law does, but would have the merit of showing up divorce for what in essence it is -- not a reward for marital virtue on the one side and a penalty for marital delinquency on the other: not a victory for one spouse and a reverse for the other: but a defeat for both, a failure of the marital "two-in-oneship" in which both its members, however unequal their responsibility, are inevitably involved together.[31]

The briefs presented by churches to the joint committee felt that the greatest danger to the sanctity of marriage was divorce by consent. They argued that the current law, because it failed to deal realistically with broken marriages, was ignored by couples who proceeded to make

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[29] Ibid., United Church brief, 414.

[30] Ibid., United and Anglican presentations, 350, 1106.

[31] Putting Asunder. London: 1966, 18.

their own informal arrangements for ending old relationships and starting new ones. A new law should therefore re-establish a role for society in recognizing those marriages that have broken down and also in repairing those that can be saved. As Rev. Wayne Smith of the Presbyterian Church said, "The Church and the Civil Magistrate are both urged to remedy sick marriages and to refrain from allowing couples to exercise their own wills and discretion."[32]

Because of this, most churches recommended some sort of procedure for reconciliation. Thus, these churches advocated an investigation, usually by the courts, into the state of the marriage. What they differed on was whether the results of this investigation should be the sole basis for granting a divorce, or whether it should simply complement the investigation of a marital offence. The choice was between marriage breakdown as the only ground for divorce or marriage breakdown as one of several grounds. On the one side were groups such as the United and Anglican churches who explicitly opposed any compromising of the marriage breakdown concept by adding a list of marital offences. On the other side were organizations which broadly agreed with the principle of marriage breakdown, but felt it could only be workable in the judicial system if there were several

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[32] Proceedings., 709. Only two witnesses (J.H. MacDonald and the Baptist Federation of Canada) recommended divorce by consent, and they recommended it only be an option for childless couples. See Report, 98-101.

legal grounds on which to try a divorce case.

The difference between the two sides was that the first believed the social sciences had advanced far enough to be able to diagnose a troubled marriage as either dead or retrievable while the second had less faith in such academic solutions. Thus the United Church proposal foresaw special court procedures where each couple would be required to attempt a reconciliation with the help of "ministers, social workers, marriage counsellors, medical doctors, and others trained in the social sciences in addition to lawyers and other court officials..."[33] This system held out the best chance of saving troubled marriages, the church argued. It provided an opportunity for the Christian virtue of forgiveness to be employed when individuals failed to be good spouses. As Rev. Frank Fidler (United) told the joint committee:

> Our Lord had compassion on the woman of Samaria. He did not reproach her for having five husbands but helped to give her a new start in life.
>
> We feel that with the marriage-breakdown concept where there are marital courts all aspects of marriage can be looked into, and this would be a much sounder basis for the state, for the minister, and for guidance as a whole to determine the future of a partner who has failed.[34]

The Anglican bishops similarly argued that this was the only effective way of dealing with the problem of broken marriages:

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[33] Ibid., 352.

[34] Ibid., 357.

> It is our opinion that this concept provides a better basis for dealing effectively with the needs of people whose marriages have failed because it requires that a marriage be dealt with in its total social and moral context.[35]

An explicit objection to this purist position came from the Canadian Committee on the Status of Women. It argued that the social sciences were not capable of accurately determining which marriages had permanently broken down and that compulsory reconciliation procedures were not viable. But nevertheless it believed that the marriage breakdown concept was superior in principle to that of marital offences and recommended that "more research be carried out in order to identify criteria which could be used as a basis for determining when, in fact, a permanent marriage breakdown has occurred."[36] It seemed that the organization's opposition to marriage breakdown as the sole ground for divorce was merely postponed pending "more research."

Among the briefs presented to the joint committee, there was overwhelming consensus for such procedures which would allow for some type of inquiry into the state of individual marriages. A law that simply granted divorces on the basis of marital offences restricted the state to a negative or passive role. Courts could only recognize that there was some kind of problem with the marriage and so

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[35] Ibid., 1102.

[36] Ibid., 471, 475.

dissolve it, without ensuring that the damage was permanent or providing any sort of help. Divorce by consent was the worst possible option because it recognized no role at all for society, making marriage an ordinary contractual relationship rather than a life-long institution. Only the marriage breakdown concept allowed society to take an active role by opening the door to professional intervention into marital troubles. In the words of the United Church brief: "Society has a vital interest in the stability of family life, and society should assert that interest by giving to its representative, the Court, and not the parties only, the final decision."[37]

However, only a minority of the joint committee endorsed the marriage breakdown concept and the use of special court procedures. The majority report opposed such procedures on the basis that they amounted to an abandonment of the British judicial tradition, where a neutral judge makes a decision based on opposing arguments. In addition, the report said these procedures were impractical for other reasons:

> A viable, practical system of divorce should not make the obtaining of a divorce more complicated or expensive to the parties or to the State. Any system that requires great expansion of courts or the appointment of investigators and large numbers of additional public servants would probably be unacceptable to the public. The amount of public money available is limited and so are the numbers of trained

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[37] Ibid., 413.

social workers and welfare personnel.[38]

But the principle of "marriage breakdown" as a catch-all for recognizing dead marriages was still recognized as valuable. So the report compromised by recommending a list of marital offences plus a list of "conditions" which it said the courts should accept as evidence that the marriage had broken down. These conditions were not considered to be the fault of either spouse, and therefore could not be called offences. In addition to such conditions as disappearance, alcoholism or drug addiction, long jail term and lengthy mental or physical illness, was the condition relevant to most broken marriages, separation for three years. In the words of the report, "There can be no better evidence that a marriage has failed than the termination of cohabitation and the failure to resume it after a substantial period of time."[39]

Thus, the joint committee redefined the marriage breakdown concept. Inquisitorial procedures were rejected. Proof of marriage breakdown was to be found not through the observations of social science, but through the presence of certain objective conditions with no bearing of guilt on either spouse. These were included with a list of marital offences creating a mix of fault and no-fault grounds for

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[38] Report, 93-4.

[39] Ibid., 24.

divorce.[40]

Pierre Trudeau, as minister of justice, agreed with this aspect of the report. When he introduced Bill C-187 in the House in December 1967, he explained his opposition to special court procedures:

> The new marriage breakdown principle contained in this bill, since it is to be administered by the existing courts in accordance with our well established judicial traditions, shies away from the vesting of any broad undefined and uncontrolled discretion in the courts, in favour of a definition of legal rights by parliament.[41]

The bill did make some minor requirements of lawyers and the courts to encourage couples to pursue a reconciliation where there was evidence this might be possible, and Trudeau did make some vague mention of the government's intention to consider providing funding for marital counselling, but the issue was effectively dead.

Among the sixteen grounds for divorce included in the bill was separation for three years. In the years following the bill's enactment in 1968, this became the basis for about half of the divorces granted.[42] While the joint

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[40] The list of marital offences recommended by in the report were: adultery, rape, sodomy, bestiality, cruelty, desertion, wilful non-support, bigamy, and non-consummation. Report. 11-18.

[41] Commons. 1967, 5015.

[42] Separation was the ground used in 57 per cent of divorces in 1969, 51 per cent in 1970 and 47 per cent in 1971. Adultery counted for about 30 per cent, and desertion (by petitioner for not less than five years) for about 10 per cent. Another thirteen grounds were available. These were sodomy, bestiality, rape, homosexual act, subsequent

committee's report argued that these divorces did not constitute divorce by consent,[43] the state's role was reduced to that of rubber stamping a decision made by the spouses. The move away from marital offences and toward no-fault laws was general among Western countries in the 1960s. By joining them, the Divorce Act contributed to a milestone in the relationship between the individual and the state.

> ...no-fault divorce provisions have overthrown the centuries-long principle that divorce must be closely regulated by the church or state. By allowing spouses the right to divorce, in effect for any reason whatsoever, the recent laws have transferred the responsibility of defining the criteria for a satisfactory marriage directly to the spouses themselves.[44]

There was no serious opposition to Bill C-187 inside or outside parliament. The difference between Croll's motion in 1950 and Trudeau's bill in 1967 were like night and day. Seventeen years was enough to change the membership of parliament drastically. From the participants of the Croll and Knowles debates of 1950, only Knowles remained in the House in 1967. And although the Catholic traditions of Quebec were still represented in the House by the Creditiste MPs, the new Quebec of the Quiet Revolution had a strong

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marriage, physical or mental cruelty, imprisonment for three years or more, imprisonment on sentence of death, addiction to alcohol or narcotics, whereabouts unknown, and non-consummation. CYB 1973, 202, 233.

[43] Report. 98. The report argued that as long as the state maintains some discretion in granting divorces, then there is no divorce by consent.

[44] Phillips, Putting Asunder, 565.

voice in cabinet through Favreau, Pierre Trudeau, Jean Marchand, and Gerard Pelletier. During debate on the bill, it was clear that the winds were now blowing in a new direction. Even hardline Catholics like Alcide Simard, while insisting "Divorce is, and will always be, a moral offence," had to admit the need to tolerate it on certain grounds.[45] Arnold Peters, feeling finally vindicated, said,

> I think we have raised this problem, from the point where divorce was a dirty word which no one would use to the point where the situation became so bad that all the news media in the country were pointing out to members of parliament that we were many years behind the times, and the need for reform was urgent.[46]

He went on to stress several times in his speech the role of the media in raising people's awareness of the issue.

The guardians of Christianity in Canada had come out in support of putting an end to the biblical influence in a matter of civil law. But as they volunteered to take one step back, they encouraged the state to take two steps forward, by providing and in some cases requiring marriage counselling for separated couples. The churches found it easier to accept a higher divorce rate as long as there were concrete efforts toward divorce prevention. The politicians (the majority of the joint committee and the minister of justice) were more realistic in their assessment of what the state could accomplish in this area. As the joint

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[45] Commons 1967, 5457-8.

[46] Ibid., 5023.

committee's report said, "The experience in Australia, and some other jurisdictions, would lead one to believe that such powers [of the courts, to actively encourage reconciliations] tend to be exercised infrequently."[47] Although the state maintained a role in the dissolution of marriage, there was little it could do to define the institution of marriage as life-long or anything else. Decades of social change, while the law stood still, had removed the possibility of such definitions being imposed on a free society.

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[47] Report. 153.

CONCLUSION

For centuries, divorce in the Western world was seen as an unacceptable threat to the institution of the family. It was believed that the best way to protect the family was to ban legal divorce, or at least make it extremely difficult to obtain. In Canada, this position was still widespread in the middle of the twentieth century. But a dissenting opinion had developed in the early part of the century. It argued that by making divorce less difficult to obtain bad marriages would be dissolved. This would allow individuals to form positive, stable and legitimate relationships through remarriage. Thus, a liberal divorce law would actually improve the institution of marriage and benefit society as a whole.[1]

These reformers were concerned with the outsiders, people in common-law relationships or those divorced and remarried in a foreign country, who were unable to gain legal recognition for their relationships in Canada. When the arguments in favour of a liberal divorce law finally won out, the reform position was largely vindicated. Marriage as a life-long contract was, on the one hand, diminished by the increasing prevalence of divorce. But the divorce rate had been spiralling even before the new law was brought in.[2] On the other hand, the ideology of the family as the basic unit

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[1] Snell, In the Shadow of the Law, 73.

[2] Phillips, Putting Asunder, 567.

of society emerged from the debate largely unquestioned, and marriage continued to be as popular as ever (see Table 2). To a large extent, then, the new divorce law succeeded in bringing in the outsiders.

Earlier in the century, there was a perception that parts of the working class were being excluded from the norms of family life by the restrictive divorce laws.[3] This was a particular instance of the general differentiation between classes. Then, after the Second World War, the middle class expanded rapidly as Canada became an increasingly urban nation with a consumer ethic. The strong assimilative forces of the middle class reshaped Canadian society, and it was these forces that were at the heart of the social changes of the 1950s and 1960s.[4] While marriage breakdown was experienced by all classes of society, and while a legal divorce was sometimes out of reach for even the wealthiest Canadians, the working class suffered the most under the restrictive regime. They were least able to afford the legal costs (especially for a parliamentary divorce), or the cost of a foreign divorce which would have given them a measure of respectability. As James Snell's study showed, in the early twentieth century they came to

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[3] Snell, In the Shadow of the Law, 72-3.

[4] For a discussion of this process see S.D. Clark, "Movements of Protest in Postwar Canadian Society," Transactions of the Royal Society of Canada. Series 4, Vol. 8, 1970, 223-37.

want the recognition of the state for their marriages and divorces.[5] When they were denied this, many of them joined the swelling ranks of common-law spouses.

In the post war era, this led to contradictory trends: as the middle class was growing, so were the number of couples shut out of the norms of a middle class marriage. These types of contradictions often spur the formation of organized pressure groups who lobby the government for change. But separated spouses, being an extremely diverse group, failed to organize.[6] However, these contradictory trends made restrictive divorce laws increasingly untenable. Circumvention of the laws through perjury and collusion became so common that members of the legal community and of parliament could no longer deny it was happening. The media, including the powerful new medium of television, raised public awareness of these facts, and in doing so made the law look ridiculous. Thus, the elites became convinced of the need for reform as the realization spread that this was a problem affecting all classes, and one that was undermining middle class concerns of respect for the law and protection of the family.

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[5] Snell, In the Shadow of the Law, 256.

[6] There were various organizations for single parents, several of which made a joint presentation to the parliamentary joint committee. Larocque noted that these groups were not politically focused and did not have the characteristics usually associated with a pressure group. See Larocque, 22, and Report, 820.

Many of these same issues were being played out in broadly similar ways in other Western societies. What made Canada's situation unique was the nature of the French/English, Catholic/Protestant split. The parliamentary records show that the federal government from the beginning of Confederation knew the divorce issue was potentially divisive, and therefore blocked any attempts at substantive reform. With the Quiet Revolution in Quebec and the liberalization of Catholic dogma, the major barrier to divorce reform in Canada was removed.

Thus the federal government's ability to reform the divorce laws with virtually no opposition in the mid 1960s showed not only the advance of secular values in Canada, it also indicated the extent of middle class assimilation. Differences of class and language were being eroded by the spread of middle class values.

These values changed organized religion, attitudes toward church and state, and the relationship between the state and the individual. The splits between Canada's Christian denominations became less important during this time, and the debate over divorce indicated how these splits were eventually tempered by a new consensus on social issues based on the views of social science. The debate also traces the churches' path from guardians of a Christian society to explicit recognition of the division between church and state. As the churches acknowledged that they could no

longer expect to legislate for society as a whole, the state also became aware of its own limited power in the area of private morality. Parliamentarians came to realize that they could not define for Canadians what constituted a successful or unsuccessful marriage. At the same time as parliament recognized that only the couples themselves could decide when to end a marriage, amendments to the Criminal Code were also being proposed regarding contraceptives, abortion and homosexuality (among others).[7]

In the decades which followed, it became clear that the 1968 divorce law did not put enough emphasis on the marriage breakdown concept. Thus the Divorce Act of 1985 put more focus on the ground of separation, reducing the length of separation from three years down to one, and shortened the list of marital offences from sixteen to two (adultery and cruelty).

The central idea in this debate was secularism -- an idea that impinged upon not only religion, but also the family and the modern state. And the idea itself was shaped by the social forces of the middle class. The advance of secularism moved Canadian divorce law away from its focus on enforcement of a Christian ideal to a focus on individual human needs. The principle of the law changed from one of

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[7] For a discussion of Pierre Trudeau's omnibus bill of amendments to the Code, see Angus and Arlene McLaren, The Bedroom and the State: The Changing Practices and Politics of Contraception and Abortion in Canada, 1880 - 1980. Toronto: McClelland and Stewart, 1986, 135.

dogma to that of utility. Some elites attempted to build a new positive role for society in preventing divorce, through the marriage breakdown concept. This effort failed, and the state's ability to enforce a monolithic notion of the family was slipping from its hands.

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APPENDIX A

THE DIVORCE AND MATRIMONIAL CAUSES ACT, (ENGLAND) 1857

The Divorce and Matrimonial Causes Act of 1857 granted a divorce to a husband whose wife had committed adultery. A wife had to prove that her husband had committed adultery under further, aggravating circumstances. These were incest, bigamy, rape, sodomy, bestiality, cruelty or desertion.

This double standard was removed in England in 1923, allowing both husbands and wives to file for divorce on the grounds of adultery. The Parliament of Canada followed suit in 1925 with the Marriage and Divorce Act. At this time, the law of 1857 (and therefore its amendment in 1925) only applied to the Western provinces and the two Territories.

In 1930, the law was put into force in Ontario when Ottawa created divorce courts in the province.

The law of 1857 removed divorce from the ecclesiastical courts in England and put it under the jurisdiction of civil courts. The ecclesiastical courts could only grant judicial separations, which provided for separate living arrangements but did not allow for remarriage. Until the new divorce courts were created, only parliament could grant a final divorce in England.

See 20-21 Victoria, c.85; Report, 51-2.

APPENDIX

TABLE A: Divorces in Canada

	Number of divorces	Rate per 100,000 pop.	Five-year average rate
1900	11		
1905	35		
1910	51		
1915	53		
1920	468		
1925	550		
1930	875		
1935	1,431		
1940	2,369		
1941	2,461		
1942	3,089		
1943	3,263		30.31
1944	3,788		
1945	5,076		
1946	7,683		
1947	8,199		
1948	6,881		53.0
1949	5,934		
1950	5,373		
1951	5,263		
1952	5,634		
1953	6,110		39.1
1954	5,923	38.7	
1955	6,053	38.6	
1956	6,002	37.3	

	Number of divorces	Rate per 100,000 pop.	Five-year average rate
1957	6,688	40.3	
1958	6,279	36.3	38.2
1959	6,543	36.8	
1960	6,980	37.4	
1961	6,563	36.0	
1962	6,768	36.4	
1963	7,681	40.6	40.7
1964	8,589	44.7	
1965	8,974	45.7	
1966	10,239	51.2	
1967	11,156	54.7	
1968	11,343	54.7	84.9
1969	26,093	124.2	
1970	29,775	139.8	
1971	29,626	137.4	

SOURCES: CYB 1956, 230: 1965, 263; 1966, 278; 1969, 260; 1973, 202.

TABLE B: Marriages in Canada

	Numbers	Rate per 100,000 pop.	Five-year average rate
1921-25	66,078		7.3
1926-30	71,886		7.3
1931-35	68,594		6.5
1936-40	96,824		8.7
1941-45	113,936		9.7
1946-50	126,687		9.8

	Numbers	Rate per 100,000 pop.	Five-year average rate
1951	128,408	9.2	
1952	128,474	8.9	
1953	131,034	8.8	8.7
1954	128,629	8.4	
1955	128,029	8.2	
1956	132,713	8.3	
1957	133,186	8.0	
1958	131,525	7.7	7.8
1959	132,474	7.6	
1960	130,338	7.3	
1961	128,475	7.0	
1962	129,381	7.0	
1963	131,111	6.9	7.1
1964	138,135	7.2	
1965	145,519	7.4	
1966	155,596	7.8	
1967	165,879	8.1	
1968	171,766	8.3	8.3
1969	182,183	8.7	
1970	188,428	8.8	

SOURCES: CYB. 1957-8, 198; 1968, 271; 1972, 207.